No. 74-1141

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 506 F. 2d 352.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1975 (App. B, *infra*). By order of February 3, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether *Milanovich* v. *United States*, 365 U.S. 551, always requires a new trial when a defendant is convicted of the mutually exclusive offenses of bank robbery and possession of the proceeds of that robbery and, if it does so require, whether it should be overruled.

STATUTE INVOLVED

The federal bank robbery statute, 18 U.S.C. 2113, is set out in Appendix C, *infra*.

STATEMENT

On February 25, 1974, respondents met Billy Wayne Davis at a truck stop in Winder, Georgia (Tr. 160–161, 243–244).[1] Davis requested a sum of money that respondent Birt owed him (Tr. 160–161). Birt replied that he had no money but that he knew where some could be obtained. He stated that there was a bank in Loganville, Georgia, that he believed could be robbed easily because the town had only one police officer (Tr. 161). After further discussion, respondents and Davis drove to Loganville to observe the bank (Tr. 162–163); they returned for additional observation each of the next two days (Tr. 166).

On February 28, 1974, respondents stole a Ford station wagon and a Ford sedan, intending to use them in the robbery and the planned escape from Loganville to Winder (Tr. 166–168). During the morning of March 6, 1974, the trio drove to Loganville in three separate cars (Tr. 172). Respondent Gaddis drove his own car and parked it on a back road leading to Winder (Tr. 169, 172). The stolen Ford sedan was left in a church parking lot on the main highway from Loganville to Winder (Tr. 169, 172). Armed with an assortment of handguns, a rifle and a double-barreled shotgun, the three drove into Loganville in the stolen Ford station wagon (Tr. 169–170, 172–174).[2]

After ascertaining the whereabouts of Loganville's lone police officer, Davis and respondent Birt donned ski masks and gloves (Tr. 173). They entered the bank while respondent Gaddis remained in the automobile, parked in the rear of the bank (Tr. 174). Brandishing pistols, Davis ordered everyone to lie on the floor while Birt looted the cashiers' drawers (Tr. 175–176). On a pre-arranged signal the two returned to the station wagon with $7,501.73 in cash and prepared to flee (Tr. 105, 176).

By chance, Loganville's police officer discovered the proceedings (Tr. 67). Respondent Gaddis promptly fired the shotgun, striking the window on the right front door of the police car and wounding the officer in the face (Tr. 67–68, 75, 177). As the robbers left, respondent Birt fired a rifle shot at the policeman, who lay on the ground near his car (Tr. 69, 177). Birt shouted to Gaddis to stop the car so that he could "have it out with the police" (Tr. 177). Gaddis re-

[1] Davis was indicted with respondents and, prior to trial, pleaded guilty. He testified for the prosecution. He was sentenced to 20 years' imprisonment.

[2] Respondents, with the intention of robbing the bank, had previously followed this same procedure on both March 2 and 5, but due to various circumstances they had not put their plan into action (Tr. 168–172).

fused and drove to the predetermined locations where the stolen cars were successfully abandoned and the proceeds were divided (Tr. 178–179).

Davis's wife later deposited some of the "bait" money in a Toccoa, Georgia bank (Tr. 115). An agent of the Federal Bureau of Investigation visited the Davis home and discovered additional bait money in a freezer (Tr. 135). Mrs. Davis stated that she had received the money from her husband (Tr. 145). As a result of the agent's investigation, a grand jury returned an eight-count indictment charging respondents and Davis with having robbed a federally-insured bank by force and violence, in violation of 18 U.S.C. 2113(a) and (d), and having possessed the funds stolen in the robbery, in violation of 18 U.S.C. 2113 (c). There was no evidence at trial of any receipt or possession of the robbery proceeds by respondents except for the robbery itself.

The district court's instructions to the jury included a complete description of the elements of each count of the indictment. The instruction on the count charging possession of the proceeds of the robbery informed the jury that it could convict on this count if defendants had either actual or constructive possession of the proceeds (Tr. 335–336, 339). The court did not tell the jury that conviction on the robbery counts would preclude conviction on the possession count, or that the possession crime created by Section 2113 (c) was directed against a class of offenders other than those who had participated in the robbery itself. Following the charge to the jury, the trial court

asked for exceptions or additions to the charge. Counsel for respondents neither objected nor offered additional instructions (Tr. 341).

The jury convicted both respondents on all counts. At sentencing, the trial judge remarked upon the serious nature of respondents' crimes and imposed on each respondent terms of 20 years' imprisonment for aggravated bank robbery (2113(a)), 25 years' imprisonment for assault in the course of the bank robbery (2113(d)), and 10 years' imprisonment for possession of the proceeds (2113(c)), all sentences to run concurrently. The trial judge stated (Tr. 346):

> [T]he court realizes that twenty-five years is the maximum, and the cases say that there is a merger of all of those offenses. If there is any question as to the legality of that sentence, that's the Court's intention.

The court of appeals reversed and ordered a new trial (App. A, *infra*). Although respondents had not objected to the instructions, the court held that it was plain error to permit the jury to convict for both taking and possessing the proceeds of the same bank robbery. We do not contest this portion of the court's holding. Relying on *Milanovich* v. *United States,* 365 U.S. 551, and *United States* v. *Abercrombie,* 480 F. 2d 961 (C.A. 5), certiorari denied, 414 U.S. 1008, the court went on to hold that, because there were no means for determining what verdict a properly instructed jury would have returned, and because the jury's verdict was inconsistent, "the proper appellate remedy is to remand for a new trial" (App. A, *infra,* p. 18).

REASONS FOR GRANTING THE WRIT

The district court may indeed have erred by failing to inform the jury that it could not convict respondents of both the aggravated robbery and their possession of the proceeds. But the holding of the court of appeals—that the only appropriate remedy is a remand for a second trial on all counts—also is erroneous, and it raises a question of substantial practical importance in the administration of criminal justice.

In many cases, the court permits a jury to return a verdict of guilty on a number of counts although, because of controlling principles of law or the inadequacy of the evidence, it is subsequently determined that the jury should not have been permitted to convict on all counts. As the number of rules designed to improve the quality of our legal process increases, this type of legal error becomes more common; courts and counsel, despite the best preparation and precautions, may overlook one or more of the settled principles while attending to the many other demands of a trial.

When such an error occurs, a desire for procedural perfection might lead to requiring a new trial, in the hope that the second trial will be error-free. But second trials are costly and should be resorted to only where necessary to accomplish substantial justice. They are costly in terms of judicial time and resources that could be devoted to other pressing needs. They are costly in prosecutorial time; the trial of other individuals may have to be postponed or foregone entirely. And they are costly in terms of achievement of the ends of public justice itself. Evidence may be lost, the memories of witnesses may fade, and witnesses may die or decline to testify.[3] Some of these changes in the availability of evidence may impair the accused's opportunity for a fair trial no less than the government's ability to prosecute those guilty of crime.

Because new trials are costly in so many ways, an accused is generally considered entitled to but a single fair trail. *Lutwak* v. *United States,* 344 U.S. 604, 619. If an individual has been found guilty after a full opportunity to be tried fairly before an impartial jury, the courts should order a new trial only if it is impossible to rectify, in another manner, any error that may have occurred during the first trial. We submit that this is an occasion where rectification without a new trial is both possible and desirable, and that the approach of the court of appeals is unnecessarily rigid and formalistic.

1. *Heflin* v. *United States,* 358 U.S. 415, held that Congress, when enacting the bank robbery statute, "was trying to reach [in the section forbidding possession or receipt of robbery proceeds] a new group of wrongdoers, not to multiply the offense of the bank robbers themselves" (358 U.S. at 420). The Court stated that Section 2113(c) provided punishment only "for those who receive the loot from the robber" (*id.* at 419). Subsequently, *Milanovich* v. *United States,*

[3] This case illustrates the problems that can be presented by second trials. We are informed by the United States Attorney that Davis, the government's principal and probably indispensable witness at the first trial, has a new attorney, through whom he has demanded release from prison in return for voluntary cooperation at a second trial. Although Davis could presumably be compelled to testify—his Fifth Amendment privilege has been extinguished by his conviction for this crime—such involuntary testimony might well be inadequate.

365 U.S. 551, applied the *Heflin* principle to larceny and receipt of the proceeds under 18 U.S.C. 641, and held that the jury must be charged that it may convict of either larceny or receiving the proceeds but not both.

In *Milanovich* the petitioners (husband and wife) had transported three confederates to the site of a planned robbery and were to wait while the robbery took place. But petitioners left prematurely, and when the three confederates discovered that their transportation had departed without them, they buried the loot. Some weeks later Mrs. Milanovich retrieved the money.

She was indicted and convicted both for the theft and for her receipt and concealment of the stolen currency. The district court sentenced her to concurrent terms of ten years' imprisonment for her part in the theft and five years' imprisonment for receipt of the proceeds. The court of appeals concluded, in light of *Heflin*, that the conviction for receipt of the proceeds was improper; it accordingly vacated the conviction on that count.

This Court found that the "evidence was sufficient to support a conviction for either larceny or receiving" (365 U.S. at 554). If the jury had concluded that Mrs. Milanovich's connection with the robbery had been sufficiently tenuous, it might have acquitted her on the robbery count and convicted her of receipt many days later of the proceeds. Because the jury might have convicted on either count, and because an appellate court was deemed not to be entitled to speculate which course a jury would have taken if properly instructed, the Court remanded for a new trial on both counts.

2. Since *Milanovich* was decided, lower federal courts have adopted a variety of conflicting approaches to cope with the recurring problems created by improper instructions to the jury and the remedy approved by this Court. For example, the Ninth Circuit has held that *Milanovich* does not apply to a charge of possession (as opposed to receipt of stolen goods) when joined with the robbery charge itself. *United States* v. *Tyler*, 466 F.2d 920, certiorari denied, 409 U.S. 1045. Accord, *Gentry* v. *United States*, Civ. No. 1–74–147, E.D. Tenn., decided November 11, 1974. These courts therefore would have decided this case differently from the court below, which earlier had expressly rejected the *Tyler* approach.[4] *Abercrombie, supra.*

Other courts have held that when the sentences under the robbery and possession counts are concurrent, further inquiry into the charge to the jury is unnecessary. See, *e.g., Ethridge* v. *United States*, 494 F. 2d 351 (C.A. 6), certiorari denied, November 18, 1974, No. 74–5259. Accord, *Tyler, supra; Gentry, supra.* But this approach has been expressly rejected by *Glass* v. *United States*, 351 F. 2d 678 (C.A. 10), and *United*

[4] We do not believe that *Tyler* is analytically correct. As the Court stated in *Milanovich*, *supra*, 365 U.S. at 554, there is no difference significant for these purposes between the charge of receipt of stolen goods under the larceny statute and the charge of possession of stolen goods under the bank robbery statute.

States v. *Roach,* 321 F. 2d 1 (C.A. 3), both of which hold that a new trial is required on all counts because, if a properly instructed jury had returned a different verdict, a different sentence might have been imposed.

A third line of cases holds that, regardless of the instructions given to the jury, if that jury convicts of robbery or possession, but not both, a new trial is not required. See, *e.g., United States* v. *Dixon,* 507 F.2d 683 (C.A. 8), petition for a writ of certiorari pending, No. 74-5869; *United States* v. *Sharpe,* 452 F.2d 1117, 1119 (C.A. 1); *United States* v. *Ploof,* 464 F. 2d 116 (C.A. 2) (by implication).

Finally, in the Fourth and Fifth Circuits a new trial is required whenever the jury is not told that it must not convict of both possession and the robbery itself. *Abercrombie, supra; Thomas* v. *United States,* 418 F. 2d 567 (C.A. 5); *United States* v. *Harris,* 346 F. 2d 182 (C.A. 4).

This divergence among the circuits is undesirable. Although there is not a square conflict on the precise issue we present in this petition, we submit that review of the decision below would significantly clarify the recurring issues raised by *Milanovich.*

3. The most common problem arising under Section 2113 is presented in this case. Frequently an individual robs a bank and is charged with both the robbery and the subsequent possession of the proceeds. The joinder of charges is proper because the evidence developed at trial, while proving possession or receipt of the robbery proceeds at sometime following the robbery, may not show a sufficiently strong connection between the accused and the robbery itself to justify

a conviction for that robbery. But if, as it did here, the evidence demonstrates a venture to rob a bank, and there is no evidence of any transfer of possession of the proceeds other than from one robber to another immediately after the event, then there is no need to submit the possession count to the jury. Indeed, often there is literally no evidence tending to show possession other than that immediately derived from the robbery.

We submit that these cases ordinarily should be treated as if a count unsupported by the evidence had been submitted to the jury. Any conviction on such a count should be set aside, and, perhaps, the case should be remanded for resentencing in light of the change in circumstances. But it is inappropriate to order a new trial, which would serve neither the interests of justice nor the needs of judicial economy.[5]

Such an approach is in our view fully consistent with both *Heflin* and *Milanovich. Heflin* itself, a collateral attack under 28 U.S.C. 2255, simply ordered the district court to vacate the "illegal" sentence for possession. In *Milanovich* the evidence would have

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[5] When a jury erroneously convicts of both a greater and a lesser included offense, the appellate court routinely vacates the conviction of the lesser offense without requiring a new trial. See, *e.g., Fuller* v. *United States,* 407 F. 2d 1199, 1227, 1230 (C.A.D.C.) (*en banc*), certiorari denied, 393 U.S. 1120. Even when the jury has acquitted of the lesser offense incident to conviction of the greater, an appellate court, on finding the evidence insufficient to establish the greater offense, may in the interests of judicial economy remand for entry of a judgment of conviction on the lesser count, where such result accords with the purport of the jury's verdict. *Allison* v. *United States,* 409 F. 2d 445, 451-452 (C.A.D.C.).

been sufficient to convict of either robbery or possession, since there was substantial independent evidence of the latter, although the statute does not permit conviction on both. It therefore may have been appropriate to allow the jury, in the first instance, to express a preference. But in the instant case all of the evidence established respondents' participation in the robbery, and, assuming that the jury correctly concluded that the respondents robbed the bank, there was no evidence that would have supported the possession count. That crime, *Heflin* emphasized, can be committed only by "those who receive the loot from the robber" (358 U.S. at 419).

4. If, however, this Court should agree with the court of appeals that *Milanovich* requires a new trial of respondents, then we submit that *Milanovich* should be re-examined. As we have contended in *Iannelli* v. *United States*, No. 73–64, argued December 17, 1974 (brief at pp. 44–56), even when two counts are erroneously submitted to a jury that should have been told that it can convict of only one, all of the consequences of the error can be corrected at the time of sentencing.[6] The trial court can vindicate the accused's interest in avoiding double punishment by imposing concurrent sentences. In this fashion the court will not "pyramid penalties for lesser offenses following the robbery" (*Heflin, supra,* 358 U.S. at 419). Appellate courts could afford adequate relief by vacating an impermissible sentence and, where necessary or appropriate, remanding to the district court for resentencing.[7]

[6] A copy of our brief in *Iannelli* is being furnished to counsel for respondents.

Because, under *Heflin,* anyone *except* a robber can commit the crime of possession of the proceeds, the first inquiry ought to be "Is the accused a robber?" If the answer is "yes," then the possession count is superfluous, whether or not the jury has convicted of possession and whether or not there was evidence to support such a conviction. Only if the answer is "no" is it necessary for the jury, or an appellate court, to examine the possession charge further.

The procedure we have suggested safeguards all of the accused's legitimate interests by fully protecting him or her against multiple punishments for a single offense. It is unnecessary for this Court to go further and require a new trial simply in the hope of securing from the jury fully consistent verdicts, for consistency among verdicts is not required. *Hamling* v. *United States,* No. 73–507, decided June 24, 1974, slip op. 10–11.

The Court should take this opportunity to clarify the law and, to the extent necessary, to rectify a situation in which judicial resources now are squandered without further vindicating the congressional pur-

[7] Although in this case the district court inaccurately described all the Section 2113 offenses as having merged upon conviction (Tr. 346), we submit that this statement discloses that court's recognition that additional punishment for the possession count is not permissible. Accordingly, it would be fully consistent with the district court's sentencing scheme to vacate the conviction for possession and leave the other sentences standing or, in the alternative, to remand for resentencing.

pose not to pyramid punishments, and without improving the quality of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1975.

APPENDIX A

United States Court of Appeals, Fifth Circuit

No. 74–2495

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT,
DEFENDANTS-APPELLANTS.

January 9, 1975

Appeal from the United States District Court for the Middle District of Georgia.

Before THORNBERRY, MORGAN, and CLARK, Circuit Judges.

THORNBERRY, *Circuit Judge:*

At 10:30 a.m., March 6, 1974, two armed men entered the National Bank of Walton County in Loganville, Georgia, and ordered everyone to lie on the floor. While one man kept the bank personnel and customers covered, the other jumped over the teller's counter and took $7,501.73 from the cashier's drawers, patting two female tellers on the cheek as he did so. The two then ran outside the bank where a third person waited at the wheel of the getaway car. While making their escape the robbers exchanged gunfire with Loganville's lone police officer, William R. Cody. None of the robbers were immediately apprehended. Several weeks later, however, Mrs. Mary Davis deposited some of the "bait money" in a Toccoa, Georgia bank. F.B.I. Agent Kane visited Ms. Davis' home, and discovered additional bait money in the freezer.

Pursuant to the FBI investigation, the government presented its evidence to the grand jury. That body returned an eight count indictment charging Bobby Gene Gaddis, Billy Sunday Birt, and Billy Wayne Davis, Mary Davis' husband, with various violations of the federal bank robbery statute, 18 U.S.C. § 2113. Billy Wayne Davis pled guilty and testified for the government at the joint trial of Gaddis and Birt. Count three of the indictment charged the three with possession of the money stolen from the National Bank of Walton County in violation of 18 U.S.C. § 2113(c).[1] The other counts of the indictment charged violations of subsections (a), (b), and (d) of the statute.[2] The trial judge's charge permitted the jury to convict Gaddis and Birt on all eight counts of

[1] "(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker."

[2] "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value

the indictment, and the jury's verdict did so. Neither the government nor the defense objected to the charge in that form. Yet we find the charge to have been plain error, and reverse and remand for a new trial.[3]

United States v. Abercrombie, 5th Cir., 480 F.2d 961, cert. denied, 414 U.S. 1008, 94 S.Ct. 368, 38 L.Ed.

exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

18 U.S.C. § 2113(a), (b), (d).

[3] Appellants raise two points in addition to their inconsistent verdict complaint. First, they claim reversible error because of certain remarks that the district attorney made during the course of the tiral. We have examined those remarks in the context of the entire record and find no reversible error. In two instances, the trial court gave a curative instruction upon defense objection. In the other instances, we find that the remarks did not constitute plain error. The cumulative effect of the prosecutor's conduct did not deprive the appellants of a fair trial.

Appellants also complain that the trial court erred in failing to require the government to produce FBI interview reports pertaining to two government witnesses. We have examined those reports, and agree with the trial judge that the reports do not fall within the definition of "statement" in 18 U.S.C. § 3500(e). The trial judge properly refused to require the government to produce the material for defense inspection.

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2d 245 (1973), directly controls our decision here. *Abercrombie* specifically holds that it is plain error to allow a jury to convict an accused of taking and possessing the same money obtained in the same bank robbery. 480 F.2d at 964. The trial judge in the case at bar did precisely that. Subsections (a), (b), and (d) do not create separate offenses. Rather they describe various stages or aggravated forms of the basic crime of stealing property from a federally-insured institution. Prince v. United States, 1957, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370; United States v. White, 440 F.2d 978 (5th Cir. 1971). This is not true of subsection (c). That subsection states a separate, distinct, and incompatible offense to those covered in the other subsections. Forrester v. United States, 5th Cir. 1972, 456 F.2d 905; United States v. White, *supra*. It relates to possessing or receiving the property stolen in the robbery. In establishing that offense, Congress was attempting to reach a new class of offenders, not to multiply the offense of the bank robbers themselves. Heflin v. United States, 1959, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed.2d 407. The jury's verdict below convicted Gaddis and Birt on seven counts relating to taking money from a federally-insured bank and on one count of possessing the same money.

There is no way of knowing what verdict a properly instructed jury would have returned in this case, and for a reviewing court to speculate on that subject would be to usurp the functions of both the jury and the sentencing judge. Milanovich v. United States, 1961, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773. Since the jury's verdict was inherently inconsistent, the proper appellate remedy is to remand for a new trial. United States v. Abercrombie, *supra;* United States v. White, *supra*.

Reversed and remanded.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1974

No. 74-2495

D. C. Docket No. CR-74-3

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.
BOBBY GENE GADDIS AND BILLY SUNDAY BIRT,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Middle District of Georgia

Before: THORNBERRY, MORGAN AND CLARK, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

JANUARY 9, 1975.

Issued as Mandate: JANUARY 31, 1975.

APPENDIX C

The federal bank robbery statute, 18 U.S.C. 2113, provides:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent

to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking

institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

U.S. GOVERNMENT PRINTING OFFICE: 1976

Supreme Court, U. S.
FILED
MAY 7 1975
MICHAEL RODAK, JR., CLERK

No. 74-1141

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

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UNITED STATES OF AMERICA, PETITIONER

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BOBBY GENE GADDIS AND BILLY SUNDAY BIRT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

When we filed our petition for a writ of certiorari we acknowledged that "there is not a square conflict on the precise issue" we presented (Pet. 10), although we urged the Court to grant the writ to clarify the recurring problems arising in the interpretation of *Milanovich* v. *United States*, 365 U.S. 551. A conflict now has developed. The Fourth Circuit, in *United States* v. *Sellers*, No. 74-1683, decided April 10, 1975, has rejected the position of

the Fifth Circuit and taken a position similar to the one we discussed at Pet. 10-12.

In *Sellers*, as in the instant case, the trial court's instructions to the jury allowed it to convict of both bank robbery and possession of the proceeds. The jury convicted on all counts, and the court sentenced Sellers to a "general" sentence of 20 years' imprisonment, treating all of the counts as merged upon conviction. Mr. Justice Clark, writing for the Fourth Circuit, rejected the approach taken in *United States* v. *Tyler*, 466 F.2d 920 (C.A. 9) (discussed at Pet. 9), which had held that *Milanovich* does not govern bank robbery cases. Passing to a discussion of the proper remedy for the instruction allowing the jury to return guilty verdicts on both the possession and the robbery count, the court wrote (App., *infra*, pp. 12a-13a):

> Searching the cases for guidance, we note that the Fifth Circuit would apparently require a new trial without further ado, *see United States* v. *Abercrombie*, 480 F.2d 961, 964 (5th Cir. 1973), *United States* v. *Gaddis*, 506 F.2d 352 (5th Cir. 1975).
>
> We think, however, that there is another solution short of a new trial which would suffice "to cure any prejudice resulting from the trial judge's failure to instruct the jury properly," *Milanovich*, *supra*, 365 U.S. at 555.

The court then adopted a variant of the procedure we suggested at Pet. 10-12. We argued that, where the evidence is overwhelming on the robbery count and merely derivative on the possession count, then

the robbery count should be affirmed and the case remanded for resentencing. In *Sellers* the proof was overwhelming on the possession count, and the accused's participation in the robbery had been inferred from his possession of the proceeds and from other circumstantial evidence. Under those circumstances, the Fourth Circuit held, the government should be allowed to stipulate to dismissal of the theft counts. If it did so, the conviction for possession would be upheld and the case remanded for resentencing (App., *infra*, p. 13a).[1]

We believe that *Sellers* not only establishes a conflict among the circuits as to the need for a new trial under these circumstances, but also supports our contention that there should be a general reconsideration and clarification of this recurring issue. Accordingly, for the reasons above, in addition to the reasons presented in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[1] The Fourth Circuit previously had held in *United States* v. *Harris*, 346 F.2d 182, that *Milanovich* required a retrial on all counts. *Harris* was drawn to the attention of the *Sellers* panel and, although the panel did not refer to *Harris*, we think it fair to suppose that *Harris* will no longer be followed in that Circuit.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1683

UNITED STATES OF AMERICA, APPELLEE

versus

WILLIE FOSTER SELLERS, APPELLANT

Appeal from the United States District Court for the Western District of North Carolina, at Asheville, N. C., Wilson Warlick, District Judge

---

Argued January 6, 1975 Decided 10 April 1975

Before CLARK, Supreme Court Justice,* HAYNSWORTH, Chief Judge, and WINTER, Circuit Judge.

Robert B. Thompson [Court-appointed counsel] for Appellant; Jimmie C. Proctor, Assistant United States Attorney, (Keith S. Snyder, United States Attorney, on brief) for Appellee.

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* Sitting by Designation.

MR. JUSTICE CLARK:

The appellant, Willie Foster Sellers, stands convicted by a jury on four counts of armed robbery of the Fallston branch of the Union Trust Company of Shelby, N. C., on August 9, 1973. He raises three claims of error: (1) the FBI's search of his apartment violated his Fourth Amendment rights; (2) the failure of his attorney to subpoena several witnesses violated his Sixth Amendment rights; and (3) his conviction for both theft and possession of stolen money was improper. We discuss these issues seriatim.

I.

At the trial, a variety of evidence linked appellant to the bank robbery. Testimony revealed that on the night of August 8, 1973, a blue Ford automobile was stolen from the parking lot in front of the Cloud Nine Lounge in Charlotte, N. C. A policeman on routine patrol duty happened to notice the car being driven off and later identified Sellers as one of the passengers. The next day, two armed men wearing ski masks robbed the Union Trust in Fallston of nearly $63,000 including a quantity of marked bills known as "bait money." Though none could identify the robbers, one witness to the theft saw the men make a getaway in the blue Ford, later found abandoned about a mile from the bank. Earlier in the day, according to other testimony, two witnesses had seen Sellers riding in the car in the vicinity of Fallston.

The most incriminating evidence, however, came from a warrant search of appellant's apartment in Atlanta, Georgia, following his arrest on September 25, 1973. There, tucked in a shoebox containing $33,150 in cash, agents found $500 of the "bait money" from the Fallston bank. In a pre-trial motion to suppress this crucial piece of evidence, Sellers attacked the affidavit supporting the warrant as lacking probable cause, but the district court rejected the claim. On appeal, he renews his attack, but we also must reject it.

In the circumstances of this case, the warrant must stand or fall on the basis of the written affidavit.[1] We therefore set out the entire document:

> I, Michael J. Santimauro, being duly sworn, depose and on oath say the following:
>
> On or about January 17, 1973, a confidential source advised Special Agent Raymond W. Stratton of the Chicago Office, Federal Bureau of Investigation, that Willie Foster Sellers was a known member and/or associate of the "McGuire Gang", headquartered in Chicago, which have been committing bank robbery offenses in the Southeastern United States, including Alabama, Georgia, Tennessee, and the Carolinas, in which handguns, sawed-off shotguns and machine guns

[1] At the suppression hearing, the Government sought to bolster the affidavit by the testimony of the issuing magistrate regarding matters discussed between himself and the FBI agent seeking the warrant. These matters were neither sworn to nor recorded as required by Fed. R. Crim. P. 41(c) and must therefore be disregarded. *See United States* v. *Acosta*, 501 F. 2d 1330 (5th Cir. 1974).

were used. The modus operandi utilized was that the participants always used facial disguises such as ski masks, costume face masks, hoods, and are completely clothed from head to toe. They steal cars for the getaway and for the "switch" car, usually the day before the robbery from a public parking lot such as a shopping center and/or hospital. After the robbery they hide in the woods and are subsequently picked up by another member in a "cool" car.

On September 23, 1973, a confidential source advised Special Agent Lee R. Wagner that Willie Foster Sellers had committed a recent number of bank robbery offenses in the South, particularly Georgia and South Carolina, stating he was utilizing ski masks, facial and costume marks and utilizing the same modum operandi as set out above. This source advised that Sellers and his accomplices were responsible for a recent bank robbery in Northern Georgia in which the bank camera was sprayed with paint.

On June 22, 1973, the Citizens Bank, Ball Ground, Georgia, was robbed by three white males armed with carbine and pistols, all wearing ski masks and similar type clothing with getaway made in a stolen automobile and abandoned in a wooded area within a five-mile radius of the bank. The modus operandi and the description of the unknown subjects fit the general description of Sellers and the two accomplices named by the source.

On September 25, 1973, at 7:30 A.M., I participated in the arrest of Willie Foster Sellers based on a federal warrant charging him with unlawful flight to avoid confinement—burglary and escape—issued May 21, 1971, Southern Dis-

trict of Alabama. Sellers was arrested outside his apartment. Information received on September 23, 1973, was such that he was traveling with other armed accomplices. The Apartment G-10 was entered in an effort to locate these individuals. In the bedroom I observed in plain view one costume type mask and brown gloves, similar to those used in the Citizens Bank robbery. In the same room, also in plain view, in an open drawer of a night stand was a loaded revolver. Various trunks, grips and packages were also observed in the apartment which are believed to contain further bank robbery paraphernalia. Upon arrest Sellers was in the process of placing some of the above trunks and luggage in the above described vehicle. The keys to this vehicle were in the possession of both Sellers and his wife, Barbara.

Review of FBI identification records shows that on three separate occasions Sellers had been convicted and sentenced on charges of burglary.

Appellant first seeks to undercut the affidavit by stripping away the corrobating detail contained in the next-to-the-last paragraph regarding the mask, gun, and gloves observed in appellant's bedroom. Seller's theory is that the warrantless entry of the apartment immediately after his arrest was itself a Fourth Amendment violation and could not be used to support probable cause. The Government defends the search under the so-called "protective sweep" theory. The relevant facts are these.

In late September of 1973, the FBI received a report from an unidentified informant that Sellers, who was a suspect in several bank robberies and a

fugitive from confinement, could be found in Apartment G-10 of the Buford Towne Apartments in a suburb of Atlanta. This was corroborated through the apartment manager who identified a photograph of appellant but advised that he was not then at the apartment. On the evening of September 24th, the manager contacted the FBI and notified them that Sellers had returned. Setting up surveillance around the apartment building, the agents waited for Sellers to appear.

Early on the morning of September 25th, a light came on and, at about 7:30 A.M., Sellers left the building and walked to his car, which he began to load with luggage. As he closed the car trunk, he was arrested on an unlawful flight warrant. Simultaneously, several of the agents rushed up the stairs to Sellers' second floor apartment, which overlooked the parking lot directly above where appellant's car was parked. According to their testimony, the agents feared that armed accomplices, who had reportedly been travelling with Sellers, might observe the arrest and fire on the arresting officers. Since their informant had already been proven correct on the exact location of Sellers' apartment and also on the make and color of appellant's car, the agents' fears could hardly be called unreasonable.

Entering the apartment, the agents hurriedly checked the rooms for occupants, but found only Mrs. Sellers and her two children. However, one agent noticed a pistol in the open drawer of the bedroom nightstand and a costume mask and a pair of gloves

in the open bedroom closet. Although this incriminating evidence was seen in plain view, nothing was seized during the cursory search of the apartment. Instead, the agents sought a search warrant based on these observations and on reports of appellant's involvement in bank robberies by two unidentified informants.

Appellant argues that this "protective sweep" of the apartment by the agents was entirely unwarranted. Under the doctrine of *Jones* v. *United States*, 357 U.S. 493 (1958), of course, probable cause for the belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant, and it follows that a search for a person or persons should be no less restrictive. Emphasizing that the exceptions to the rule that a search must rest upon a search warrant are jealously guarded, appellant points to the following circumstances: (a) the agents here had seen no activity all during the night save the turning on of a light around 6 A.M.; (b) Sellers was unarmed at the time he was arrested and gave no resistance; (c) Sellers' wife and children were standing at the open door of his upstairs apartment and the officers had a commanding view of the portion of the apartment which overlooked the parking lot where the arrest took place; (d) the officers made no effort to secure a search warrant; and (e) while it is conjectural whether one could have been obtained, the fact is that the only additional information made available by the search was that no accomplices were present. Given these

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facts, Sellers contends that there was no "exident circumstances" to justify the intrusion, citing *United States* v. *Basurto*, 497 F. 2d 781 (9th Cir. 1974); *United States* v. *Cooks*, 493 F. 2d 668 (7th Cir. 1974); and *United States* v. *Gamble*, 473 F. 2d 1274 (7th Cir. 1973).

We do not find appellant's cases helpful. In none of them did the officers have reasonable grounds, such as those here, to believe that the arrestee was travelling with armed associates. On the other hand there are several cases which are more instructive. For example, in *United States* v. *Looney*, 481 F. 2d 31, 33 (5th Cir. 1973), the court approved the conduct in making "a cursory security search to protect their lives" when the arrestee's confederates might be present. Furthermore, the Eighth Circuit has unheld an officer's "right to conduct a quick and cursory viewing of the apartment area for the presence of other persons who might present a security risk." *United States* v. *Briddle*, 436 F. 2d 4, 7 (8th Cir. 1970); *accord United States* v. *Blake*, 484 F. 2d 50, 57 (8th Cir. 1973). We therefore find no constitutional infirmity in the agents' cursory sweep of Sellers' apartment, and in turn find it to be the linchpin of the search warrant affidavit.

Sellers attacks the affidavit on the grounds that—even with the allegations about the gun, mask, and gloves spotted during the "protective sweep"—it does not allege that the informers were reliable nor does it allege sufficient facts for the magistrate to so conclude. Appellant argues that:

> Handguns and gloves are common items to be found in most any residence. While a costume mask, even a month before Halloween, may be an unusual item to find in a dwelling, in the context of this case it certainly is not sufficient to establish probable cause.

We cannot agree. As he admits himself in his brief, "the mask connects with the informer's tip, as in *Spinelli*, where the informer's tip is a necessary element in the finding of probable cause." The observations of the agents in their initial sweep of Sellers' apartment provide ample corroboration for the informers allegations of appellant's complicity in bank robbery. *See Draper* v. *United States*, 358 U.S. 307 (1959); *United States* v. *Simpson*, 453 F. 2d 1028 (10th Cir.), cert. den. 408 U.S. 925 (1972).

II.

Appellant urges that his Sixth Amendment rights were violated by the conduct of his trial counsel and by the district court's denial of his motion for compulsory production of witnesses. We see no merit to these claims.

It appears from the record that Sellers' counsel was initially retained by appellant's family for a fee of some $1,000. On April 25, 1974, an evidentiary hearing was held on appellant's motion to suppress the evidence seized in the September 25, 1973, search of his apartment and counsel vigorously acted on behalf of Sellers at that hearing. At the end of the day, the court appointed him to serve as Sellers'

counsel when it was determined that appellant was indigent and his family could no longer pay for retained counsel. By letter filed May 3, 1974, the motion to suppress was denied, and on May 7, 1974, counsel conferred with the district court in an effort to secure an interlocutory appeal of the ruling.

The next day, May 8th, when the trial was scheduled to begin, an associate of appellant's counsel appeared in court and announced that the latter desired to withdraw from the case, allegedly because his relationship with Sellers had deteriorated. The district court was incredulous, pointing out that only the day before no indication of such a difficulty had been manifested. Sellers himself remarked in open court that his counsel was "a first-rate lawyer." The trial judge then insisted that counsel make his appearance and that the trial proceed as scheduled.

At that point, appellant raised the issue of his counsel's failure to subpoena three witnesses who, according to Sellers, could exonerate him. When Sellers' attorney finally appeared, a lengthy colloquy ensued in which affidavits from three inmates of the federal prison at Marion, Illinois, were produced. These inmates—one of whom was a personal friend of appellant—offered to identify as the true bank robbers certain unnamed parties whose conversations and letters supposedly boasted of their feats. Both appellant and his counsel disclaimed knowledge of how the inmates learned of the case and of counsel's name even though the affidavits referred to previous contact with the counsel.

Prior to trial, a hearing was held on appellant's motion for a continuance and his request to subpoena these and other witnesses. Sellers took the stand and defended the pertinency of his list of proposed witnesses. From the transcript of proceedings, it appears that the trial judge found appellant's assertions that his counsel refused to subpoena these witnesses to be incredible and therefore denied the continuance and the subpoenas. Under Fed. R. Crim. P. 17(b), a defendant must make a satisfactory showing that "the presence of the witness is necessary to an adequate defense" in order to be entitled to compulsory process. Here, appellant failed of his burden, since, as the trial court later explained to Sellers, "none of the things that you say they would testify to would have been relevant or competent or admissible in evidence." We thus conclude that appellant was denied neither effective assistance of counsel nor the right to witnesses in his own behalf as guaranteed by the Sixth Amendment.

III.

We turn then to appellant's last contention. Sellers claims that the case was improperly submitted to the jury under instructions which allowed them to convict him of both possession of stolen bank funds under 18 U.S.C. § 2113(c) and theft of bank funds under 18 U.S.C. § 2113(a), (b) & (d). We agree. Under *Heflin* v. *United States*, 358 U.S. 415 (1959), it is firmly established that § 2113(c) was not enacted to enhance the punishment for one who robs

a bank but only to provide punishment for a separate and distinct class, those who receive the loot from the robber. *Accord Milanovich* v. *United States*, 365 U.S. 551 (1961). We are unpersuaded by the Government's proffered distinction between "receiving" and "possession" and decline to follow *United States* v. *Tyler*, 466 F. 2d 920 (9th Cir.), cert. den., 409 U.S. 1045 (1972); nothing in the legislative history of § 2113(c) or the Supreme Court's opinion in *Heflin* would justify such a distinction.

The question remains as to the proper remedy in such circumstances. Here, the trial court imposed a single, general 20-year sentence on appellant for all of the counts. Although Sellers could have been sentenced for up to 25 years on § 2113(d) or 20 years on § 2113(a), the maximum sentence available under § 2113(c) is only ten years. Since the penalty which was actually imposed exceeds that prescribed for the possession count, the rule of judicial convenience employed in *United States* v. *Mims*, 340 F. 2d 851 (7th Cir. 1965) is therefore inapplicable. Searching the cases for guidance, we note that the Fifth Circuit would apparently require a new trial without further ado, *see United States* v. *Abercrombie*, 480 F. 2d 961, 964 (5th Cir. 1973), *United States* v. *Gaddis*, 506 F. 2d 352 (5th Cir. 1975).

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[2] The late Judge Sobeloff suggested just such an approach in his thoughtful dissent in the *Milanovich* case when it was originally before this Circuit. See *Milanovich* v. *United States*, 275 F. 2d 716, 724 (4th Cir. 1960) (Sobeloff, C.J., dissenting).

We think, however, that there is another solution short of a new trial which would suffice "to cure any prejudice resulting from the trial judge's failure to instruct the jury properly," *Milanovich*, *supra*, 365 U.S. at 555. *Cf. United States* v. *Lemonakis*, 485 F. 2d 941, 966 (D.C. Cir. 1973). Since the proof of guilt on the possession count is overwhelming and the proof on the theft counts circumstantial, a stipulation by the Government that proof of guilt went only to the lesser count would give appellant the benefit of the doubt and justify our vacating the three theft counts. If, on remand, such a stipulation is entered, it remains necessary for the court to resentence Sellers on the possession count alone. Should the government choose not to so stipulate, the conviction on all counts will be vacated and Sellers awarded a new trial.

For the reasons stated, the judgment is set aside, and the case remanded to the district court for proceedings consistent with this opinion.

It is so ordered.

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APPENDIX

Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1141

UNITED STATES OF AMERICA, PETITIONER

—v.—

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 10, 1975
CERTIORARI GRANTED MAY 27, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1141

UNITED STATES OF AMERICA, PETITIONER

—v.—

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RELEVANT DOCKET ENTRIES

CRIMINAL DOCKET
FIFTH CIRCUIT COURT OF APPEALS

No. 74-2495

DATE	PROCEEDINGS
1974	
5-30	Filed Notice of Appeal
6-4	Case Docketed
6-5	Filed Order of District Court Appointing Counsel
6-5	Filed Duplicate Notice of Appeal and Clerk's Statement of Docket Entries
6-5	Filed C.J.A. #20 Appointing Counsel
6-5	Filed District Court Stipulation for Consolidated Appeal
7-12	Filed Record on Appeal 2 vols. (Trans. 347 pgs.)
7-12	Filed Exhibits
8-14	Appellant's Brief due, ext. to 8/22/74 only
8-22	Filed Brief for Appellants
9-11	Appellee's Brief due, ext. to 9/23/74
9-24	Filed Brief for Appellee
12-5	Oral argument in New Orleans
1975	
1-9	Opinion rendered, reversed and remanded
1-28	C.J.A. #20 rec'd—Wilcox
1-28	C.J.A. #20 rec'd—Mann
1-31	Judgment as Mandate Issued to Clerk
1-31	Exhibits returned to Clerk—2 envl.

DATE	PROCEEDINGS
2-7	Filed Order of Supreme Court—Extending time for filing certiorari petition to 3/30/75 (2/3/75)
3-19	Filed Notice of Filing of Cert. Petition (3/10/75)
6-3	Filed Order of Supreme Court granting certiorari (5/27/75)
6-27	Preparing Proceedings on Certiorari (Original Record)

CRIMINAL DOCKET

U. S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CR-74-3-ATH

DATE	PROCEEDINGS
1974	
4-3	Filed Indictment and Vote of Grand Jury.
4-3	J. S. 2 Report prepared.
4-3	Issued Bench Warrant for defendants, DAVIS, BIRT and GADDIS.
4-5	Filed U. S. Magistrate's Report of Proceedings as to BILLY WAYNE DAVIS.
4-8	Filed U. S. Marshal's Return showing that GADDIS was arrested at Winder, Ga., on April 3, 1974.
4-8	Filed U. S. Marshal's Return showing that BIRT was arrested at Winder, Ga., on April 3, 1974, and committed to City Jail, Warner Robins, Ga., this same date.
5-3	Filed Motion for Additional Peremptory Challenges. (Birt)
5-3	Filed Motion for Discovery and Inspection. (Birt)
5-3	Filed Motion for Reduction of Bond. (Birt)
5-3	Filed Motion for Severance. (Birt)
5-3	Filed Motion for Discovery and Inspection. (Gaddis)
5-3	Filed Motion for Additional Peremptory Challenges. (Gaddis)
5-3	Filed Motion for Severance. (Gaddis)

DATE	PROCEEDINGS

5-6 Filed Answer to Motion of Defendants Billy Sunday Birt and Bobby Gene Gaddis for Additional Peremptory Challenges.

5-6 Received Government's Memorandum in Opposition to Motion for Discovery and Inspection filed by Defendant Billy Sunday Birt.

5-6 Received Government's Memorandum in Opposition to Motion for Discovery and Inspection Filed by Defendant Bobby Gene Gaddis.

5-6 Received Government's Memorandum in Opposition to Motions for Severance Filed by Defendants Billy Sunday Birt and Bobby Gene Gaddis.

5-7 Filed Motion to Reduce Bail of Bobby Gene Gaddis.

5-10 Filed Hearings on Pretrial Motions in Macon, Ga., at 2:00 P.M., on May 8, 1974.

5-13 First day of Jury trial.

5-14 Second day of Jury trial.

5-15 Third day of Jury trial.

*4-17 Entered Plea of Guilty to Ct. 2 as to DAVIS.

5-1 Entered Plea of Not Guilty as to BIRT.

5-1 Entered Plea of Not Guilty as to GADDIS.

5-15 Sentence

—BIRT—Cts. 4, 5, 6, 7, 8, 25 yrs. impr.; Cts. 1, 2, 20 yrs. impr.; Ct. 3, 10 yrs. impr.; all cts. to run conc. (WDO) CO Vo

—GADDIS—Cts. 4, 5, 6, 7, 8, 25 yrs. impr.; Cts. 1, 2, 20 yrs. impr.; Ct. 3, 10 yrs. impr.; all cts. to run conc. (WDO) Co

—Birt & Gaddis sentenced on May 15, 1974, entered on docket May 28, 1974.

DATE	PROCEEDINGS

5-16 Sentence

—DAVIS—Ct. 2, 20 yrs. impr.; may become eligible for parole at such time Board of Parole may determine under 18:4208(a)(2). (WDO) Sentenced 5-16-74—entered on ??——??

5-15 J. S. Report prepared as to BIRT and GADDIS.

5-16 J. S. Report prepared as to DAVIS.

5-30 Filed Notice of Appeal of Billy Sunday Birt.

5-30 Statement of Docket entries and Certified copy of Notice of Appeal mailed to CCA-5 for Billy Sunday Birt.

5-16 Filed Order for Dismissal to Cts. 1, 3, 4, 5, 6, 7, 8, as to DAVIS.

5-30 Filed Notice of Appeal of Bobby Gene Gaddis.

5-30 Filed Stipulation for Consolidated Appeal.

5-31 Statement of Docket Entries and Certified Copy of Notice of Appeal and Stipulation for Consolidated Appeal, mailed to CCA-5 for BOBBY GENE GADDIS.

6-26 Filed transcript of evidence.

7-10 Record on Appeal forwarded to CCA-5.

7-22 Filed U.S. Marshal's Return showing that Billy Sunday Birt was delivered to USP, Atlanta, Ga. on 6/10/74 and was removed on 6/13-74 to USP at Marion, Ill.

7-22 Filed U.S. Marshal's Return showing that Bobby Gene Gaddis was delivered on 6-10-74 to USP at Atlanta, Ga.

10-18 Filed Transcript of Sentencing of Billy Wayne Davis.

DATE	PROCEEDINGS
1975	
2-3	Filed Mandate of CCA-5 reversing Judgment of District Court.
2-4	Filed Order of the Court making the Judgment of CCA-5 the Judgment of the District Court.
2-13	Filed transcript of Arraignment held at 4:15 P.M., April 17, 1974, in Macon, Ga., Hon. Wilbur D. Owens, Jr., presiding.
2-7	Filed Order of the Court ordering the U.S. Marshal, MD-Ga hold Billy Wayne Davis in the Middle District of Georgia until further order of this court. WDO
4-22	Filed U.S. Marshal's Return showing that Billy Wayne Davis was delivered on February 18, 1975, to Warden, U.S.P. at Lv.Ks.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Criminal No. 74-3-ATH

Violation: 18 U.S.C. 2113(a)
18 U.S.C. 2113(c)
18 U.S.C. 2113(d)
18 U.S.C. 2

UNITED STATES OF AMERICA

v.

BILLY WAYNE DAVIS
BILLY SUNDAY BIRT
BOBBY GENE GADDIS

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, did enter the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to commit in such bank a felony affecting such bank, that is, the taking by force and violence and by intimidation and from the presence of employees of such bank, money belonging to and in the care, custody, control, management, and possession of the bank; all in violation of 18 U.S.C. 2113(a), and 18 U.S.C. 2.

COUNT TWO

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS,

BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money, belonging to and in the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation; all in violation of 18 U.S.C. 2113(a) and 18 U.S.C. 2.

COUNT THREE

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, unlawfully and knowingly did possess about Seven Thousand Four Hundred Forty-one Dollars ($7,441.00), which had been taken and carried away with intent to steal and purloin from the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were insured by the Federal Deposit Insurance Corporation at the time of such taking and carrying away, and the said BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, knew said money to have been so taken and carried away; all in violation of 18 U.S.C. 2113(c), and 18 USC 2.

COUNT FOUR

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Penny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money belonging to and in the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of

which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one William Remo Cody and did put in jeopardy the life of the said William Remo Cody by means and use of a dangerous weapon, that is, a .30 caliber rifle; all in violation of 18 U.S.C. 2113(d), and 18 U.S.C. 2.

COUNT FIVE

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money belonging to and in the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one William Remo Cody and did put in jeopardy the life of the said William Remo Cody by means and use of a dangerous weapon, that is, a .20 gauge shotgun; all in violation of 18 U.S.C. 2113(d), and 18 U.S.C. 2.

COUNT SIX

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money belonging to and in the care, custody, control, management and possession of the National Bank

of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one Zalia Smith and did put in jeopardy the life of the said Zalia Smith by means and use of a dangerous weapon, that is, a .38 caliber revolver; all in violation of 18 U.S.C. 2113(d), and 18 U.S.C. 2.

COUNT SEVEN

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money belonging to and in the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one Jenny Brooks and did put in jeopardy the life of the said Jenny Brooks by means and use of a dangerous weapon, that is, a .38 caliber revolver; all in violation of 18 U.S.C. 2113(d), and 18 U.S.C. 2.

COUNT EIGHT

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money beyonging to and in the care, custody, control,

management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one Faye Jackson and did put in jeopardy the life of the said Fay Jackson by means and use of a dangerous weapon, that is, a .45 caliber pistol; all in violation of 18 U.S.C. 2113(d) and 18 U.S.C. 2.

A TRUE BILL.

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Foreman of the Grand Jury

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Assistant United States Attorney

* * * *

EXCERPT FROM TRIAL COURT'S INSTRUCTIONS

Ladies and gentlemen, let's look at this indictment, and talk about the essential legal ingredients that you ladies and gentlemen must find to reach a verdict in this case. You will notice, ladies and gentlemen, that at the end of each of these counts—each count is a separate charge of a violation of a law. Each count stands separately on its own feet, you might say. You will notice at the end that there is a reference to certain laws of the United States numerically identified. For instance in Count 1 it says 18 USC 2113(a), and 18 USC 2. These are each laws of the United States as passed by Congress. You look in these red books called United States Code Annotated and you can find each of those laws, and I'm going to just tell you what those laws say.

18 USC 2, ladies and gentlemen, is the basis for the allegation in this indictment "aided and abetted by each other. In a case where two or more persons are charged with the commission of a crime, the guilt of one defendant may be established without proof that that defendant personally did every act constituting the offense charged. And the reason for that is that the law as cited states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." We use the term "principal" as the term of a main actor—principal with an "a-1" being the main thing. He's punishable as a participant in the crime.

Let's back up and go over that one more time. There are two categories of principal under this statute. First of all, it says whoever commits an offense against the United States is punishable as a principal. That is the person who actually does it—who is the active participant. He is punishable as the principal. And then it says there is another category of persons who are also punishable as principal—punishable the same as the person who is the active participant. And those are, "whoever aids, abets, counsels, commands, induces, or procures" the commission of that crime, are also guilty as a principal. In other words, everybody is in the same category is what this statute says—the one that goes or actively does it, and everybody who aids, abets, counsels, commands, induces, or procures the commission of a crime. The law looks at them equally.

And then the statute also says that whoever willfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal. So we have a further category of principal, and that is whoever willfully causes someone else to do an act which, if directly performed by him or by another would be an offense against the United States, is punishable as a principal.

In other words, every person who willfully participates in the commission of a crime may be found guilty of that offense.

In order to aid and abet another to commit a crime, it is necessary that an accused willfully associate himself in some way with the criminal venture and willfully participates in it as he would in something he wishes to bring about. That is to say that he willfully seeks by some act or omission of his to make a criminal venture succeed. And that is the statutory foundation of the aiding and abetting allegation that you see throughout this indictment.

Now you also will see in this first count the word "intent" and you will see it in other parts of this indictment. Now in that connection, let me tell you what we mean by the word intent, ladies and gentlemen. The series of crimes that are charged in this indictment are serious crimes which require proof of specific intent before either of these defendants can be convicted. Specific intent as the term implies means more than a general intent to commit an act. To establish specific intent the Government must prove that the defendants knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or failure to act is knowingly done if it is done voluntarily and intentionally, and not because of mistake of accident or other innocent reason.

Now ladies and gentlemen, let's talk about 18 USC 2113 which is the bank robbery statute as passed by Congress. This statute, ladies and gentlemen, read in a common sense fashion, makes each and every phase of the robbery of a bank or a savings and loan association —it has to have some federal connection—a crime. In other words you start out from the very beginning and you could have multiple series of crimes, and I'm going to tell you what each series and stage of the crime is. Congress first says in subsection (a) in second paragraph, that whoever enters or attempts to enter any bank with intent to commit in such bank any felony affecting such bank, shall be guilty of an offense against the United States. That's the first stage under this statute. Whoever enters or attempts to enter any bank with intent to commit in such bank any felony affecting such bank shall be guilty of a crime against the United States. So there we are talking about whoever enters or attempts to enter.

Secondly it says, in subsection (a), whoever by force and violence or by intimidation takes from the person or presence of another any money belonging to any bank shall be guilty of a crime against the United States. So there we see that we start out with whoever attempts to enter any bank with the intent to commit a felony, or whoever enters a bank, is guilty of a crime against the United States. It further says, now that we are in the bank, that whoever by force and violence, or by intimidation, takes money belonging to any bank, is guilty of a crime. So there we have in that subsection two different crimes already.

All right. We progress on beyond that. Subsection (c) says that whoever receives, possesses, conceals, stores, barters, sells, or disposes of any money knowing the same to have been taken from the bank in violation of this law, shall be guilty of a crime. This is whoever receives, possesses, conceals, stores, barters, sells, or disposes of any money that is taken in violation of this law,

knowing it to have been taken from a bank, is guilty of a crime. Another crime—a separate crime.

Then in subsection (d) it says whoever in committing or in attempting to commit any offense that I have already defined for you, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be guilty of a crime against the United States. So that's another crime against the United States. So you see, it's like turning on a water hose and the water flows. In this case Congress has by law determined that there are a series of crimes that can be committed—separate crimes—in the course of robbing a bank.

Congress has said that as used in this law the term "bank" means, among other things, any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation. So you ladies and gentlemen must find that the deposits of the named bank were insured by the Federal Deposit Insurance Corporation for this law to even be applicable. That's an essential ingredient of each and every count of this indictment.

Let's talk about some of the terminology that I have given you ladies and gentlemen that is used. Of course the Court has already told you ladies and gentlemen what the word "willfully" means. You will remember that definition.

We have talked about "intent"—we have talked about "knowingly."

The words "to take by intimidation" should be defined for you ladies and gentlemen. To take or attempt to take by intimidation means willfully to take or attempt to take by putting in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim. However the fear of the victim need not be so great as to result in terror, panic, or hysteria. The taking or an attempted taking by intimidation must be established by proof of one or more acts or statements of the accused which were done or made in such a manner and under such circumstances as would produce in an ordinary person fear of bodily harm. How-

ever, actual fear need not be proven. Fear, like intent, may be inferred from statements made and acts done or omitted by the accused, and by the victim as well, and from all the surrounding circumstances shown by the evidence in the case.

Now what do we mean by "assault" a person? If you ladies and gentlemen should reach the point that you need to determine whether an assault has been committed then you will need this definition. Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so or any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching or striking or doing bodily harm to the person of another. So a person who has the apparent present ability to inflict bodily harm or injury upon another person, and willfully attempts or even threatens to inflict such bodily harm, as by intentionally flourishing or pointing a pistol or gun at another person, may be found to have assaulted such person.

Now what do we mean to put in jeopardy the life of a person by the use of a dangerous weapon or device? A dangerous weapon or device includes anything capable of being readily operated, manipulated, or otherwise used, to inflict severe bodily harm or injury upon another person. So an operable firearm such as a pistol, revolver, or other gun, capable of firing a bullet or other ammunition, may be found to be a dangerous weapon or device. To put in jeopardy the life of another person by the use of a dangerous weapon or device means to expose such person to a risk of death or to the fear of death by the use of such dangerous weapon or device.

Having defined those various terms, let's go over the counts of this indictment and see what you ladies and gentlemen must find to legally be in position to render a verdict of guilty as to each of these defendants.

I first point out to you ladies and gentlemen that you look at the cases as to each of these defendants separately. We are determining whether or not Billy Sunday Birt did what he is charged with; we are determining

separately whether or not Bobby Gene Gaddis did what he is charged with doing. You've got to look at each person separately. You also look at each one of these counts or charges separately. You've got to look separately as to each person and separately as to each and every count of this indictment.

Let's begin with Count 1 that charges on or about the 6th day of March, 1974. When we talk about the date, legally speaking, the Government is not required to prove that an event happened exactly on the date that is charged in the indictment. It is sufficient to prove that it happened on or about that date.

Secondly it says, in the Middle District of Georgia. You ladies and gentlemen will recall that the Court advised you on Monday morning that Congress had named this court the United States District Court for the Middle District of Georgia. They passed a law that says that. And in doing so you will recall that they determined that 70 of our Georgia counties are within the jurisdiction of this Court. So this means that this happened within one of those 70 counties, and I would charge you that the county in which the National Bank of Walton County and in which Loganville are located, are within the Middle District of Georgia as defined by Congress.

It next says that Billy Wayne Davis, Billy Sunday Birt and Bobby Gene Gaddis, aided and abetted by each other, did enter this bank with the intent to commit in such bank a felony affecting such bank—that is the taking by force and violence and by intimidation from the presence of the employees of such bank, money belonging to and in the care, custody, control, management and possession of this bank.

Of course you must find in this case that Billy Sunday Birt and Bobby Gene Gaddis, in accordance with—that they either actively went in the bank or that they either willfully participated in the manner defined under this aiding and abetting statute that the Court has already told you about. That they did in some capacity enter this bank, and its deposits were insured by the Federal Deposit Insurance Corporation, and that when they en-

tered that bank it was with the intent to commit in the bank a felony, and the robbery—of course if you enter with the intent to rob the bank then that would be, since robbery is a felony, an intent to commit a felony.

So we've got to establish the date, got to establish the participation as defined by each of these defendants, that they did enter this bank, that its deposits were insured by the Federal Deposit Insurance Corporation, and that the entry by them was with the intent to commit in that bank a felony and the indictment tells you what the felony is. You must find those ingredients to find each of these defendants guilty on Count 1.

Count 2 says—you've got the same date situation, the same Middle District, the same people, that by force and violence and by intimidation—you've got to find that there was force and violence and intimidation—did take from the person and presence of Zalia Smith and Jenny Brooks, about $7,441 in money that belonged to and was in the care and custody, etc., of this bank, whose deposits were insured by the Federal Deposit Insurance Corporation. So you have to find that it happened on or about that date, that they participated in it, or aided and abetted each other, that by force and violence and by intimidation that there was a taking from the person and presence of these two bank employees of about this amount of money. Now the exact amount of money, ladies and gentlemen, is not necessary to be proved. It just has to be a substantial sum of money, about the amount alleged in the indictment. You've got to find that that money belonged to or was in the care, custody, control, management and possession of this bank, and that its deposits were insured by the Federal Deposit Insurance Corporation.

All right, we proceed on to Count 3. In this count, ladies and gentlemen, it charges that these defendants did possess this money which had been taken and carried away with the intent to steal from this bank whose deposits were insured by the Federal Deposit Insurance Corporation, and that at the time they knew said money to have been so taken and carried away. Now what do we mean by possess? The law recognizes two kinds of

possession—actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. I am in actual possession of this pencil, you ladies and gentlemen are in actual possession of the pencils you hold and the papers that you hold. You have it—actually have it. On the other hand, a person who although not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons is then in constructive possession of it. If you ladies and gentlemen wore a coat this morning, which is very doubtful, but if you had worn a coat and left it back in the jury room, it's still your coat, and you have the intention when you leave to go back there and get it and take it with you. You are in constructive possession of it. My automobile is parked behind the building. I have the keys in my pocket. I intend to go out there and drive it off. I'm in constructive possession of it. I lay a pencil down, and I intend at sometime to use it, and though it is not in my hand I constructively possess it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, the possession is sole. If two or more persons share actual or constructive possession, possession is joint.

So that is Count 3. And you've got to find exactly what's set forth in that count to find guilt on the part of each of these defendants.

Then Count 4 says that on or about the 6th day of March in the same place these same people, aided and abetted by each other by force and violence and by intimidation did take from the person and presence of these same people about the same amount of money belonging to and in the care, custody and control of this bank, insured by the Federal Deposit Insurance Corporation. And it further says, and these defendants, aided and abetted by each other, in committing the aforesaid offense did assault one William Remo Cody, and did put in jeopardy the life of said William Remo Cody by means

and use of a dangerous weapon, that is a .30 caliber rifle, all in violation of the laws that the Court has told you about.

So it is, ladies and gentlemen that you will have to begin remembering that we are going one step further down the road in charging the commission of a crime. You've got to find the date, the participation by each defendant, that by force and violence and by intimidation there was a taking from the person and presence of the named people about this amount of money that belonged to or was in the care, custody and control of this bank insured by the FDIC, and then you've got to further find that these individuals, aided and abetted by each other, in committing this as charged, did assault one William Remo Cody, and did put in jeopardy Mr. Cody's life, by means and use of a dangerous weapon, that is a .30 caliber rifle. You must find all of that for that to be a violation of the law.

Count 5 charges substantially the same thing except that it says that Mr. Cody's life was put in jeopardy by means and use of a different dangerous weapon, that is a .20 gauge shotgun. You must find the same thing except in this case by means of a .20 gauge shotgun.

Thirdly, it says essentially the same thing except that in committing the aforesaid offense that these defendants did assault one Zalia Smith, and put in jeopardy her life by means and use of a dangerous weapon, a .38 caliber revolver. You will have to find that Zalia Smith was assaulted and that her life was put in jeopardy by means and use of this dangerous weapon, to find guilt as to that count of the indictment.

Then Count 7 is essentially the same thing except that it says that in committing this offense these individuals did assault one Jenny Brooks, and did put in jeopardy her life by means and use of a dangerous weapon, a .38 caliber revolver. You must find the same thing except as to Jenny Brooks and except as to that weapon, in Count 7.

Then Count 8 charges essentially the same thing except that it says that in committing this offense that these defendants did assault one Faye Jackson, and put in

jeopardy her life by means and use of a dangerous weapon, that is a .45 caliber pistol. You must find those ingredients, ladies and gentlemen, for there to be a finding of guilt on that count of this indictment.

I believe, ladies and gentlemen, that that covers the principles of law as I presently see them as they are applicable to this case except as to the form of your verdict and as to the procedure that you should use in arriving at your verdict.

Attached to this indictment is a form of verdict that has been prepared for your use. It's the last thing on the back of the indictment. Now when you ladies and gentlemen go to your jury room, and at that time only the twelve jurors who were first selected will go—the alternates will be then separated—the first thing that you ladies and gentlemen will do is to elect a foreman or a forelady. You do that by a majority vote. But after you do that by a majority vote, thereafter you make all of your decisions by the unanimous action of all twelve jurors. You take up every count of this indictment as to each of these defendants, arriving at a verdict as to each count and as to each defendant. That verdict, of course, will be guilty or not guilty, as to each defendant and as to each count.

Let your foreman enter the words "guilty" or "not guilty" in the blank spaces that are provided. It says, "We the jury find the defendant Billy Sunday Birt ———— on Count 1, ———— on Count 2" and there's a blank on every count of the indictment. Enter the words there. Do the same as to Bobby Gene Gaddis on each count. Insert the date, let your foreman sign where it says "foreman." So that the Court will have evidence that this is the verdict of all twelve jurors, then let the other eleven jurors sign where is says "We concur." There are eleven other spaces. When we get through we have the foreman and the other eleven jurors' signatures at the botton of the verdict. And then return your verdict into Court.

I do not anticipate, ladies and gentlemen, that it will be necessary that you ladies and gentlemen ask any questions of the Court during your deliberations. If

that anticipation is unfounded and you want to ask a question you may write it on a piece of paper and hand it to the Marshal and he will bring it to me and I will respond in an appropriate manner.

I caution you that if you wish to do that, do not write on there "Judge, we are hung up 11 to 1, 6 to 6, or 9 to 3, and we want you to answer this question." How you then stand is your business and your business alone—that is how you are divided numerically. You should not disclose your division if there be division, to anybody—be it the Marshal or the Judge or anybody else. That is purely your private business. So please do not do that even if you choose to write a question the Court.

In a few minutes I'm going to let the lawyers suggest to me what I may have failed to tell you ladies and gentlemen, or may have told you incorrectly. If necessary, I will bring you back and correct or add to. If not, the Marshal will bring you the evidence, the indictment and the form of the verdict with the Court's instructions to begin your deliberations. But before the Marshal takes you to your jury room, let me remind you, ladies and gentlemen, that you have been chosen and sworn as jurors to try the issues of fact in this case. You are to perform your duty without bias or prejudice as to any party. Our system of law, ladies and gentlemen, does not permit jurors to be governed by prejudice, public opinion, or sympathy. Both the parties and the public expect that every juror on every jury will carefully and impartially consider all of the evidence in every case and follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

We appreciate your attention throughout this trial, and at this time the Marshal will take you ladies and gentlemen to your jury room.

(Alternates are instructed to wait outside the jury room.)

JURY REMOVED FROM COURTROOM.

THE COURT: Any corrections or additions for the Government?

MR. CARSON: None, Your Honor.

THE COURT: For the defendants?

MR. MANN: None on the part of Defendant Gaddis, Your Honor.

MR. WILCOX: None on the part of defendant Birt, Your Honor.

THE COURT: All right. Let the jury begin its deliberations. The Court will take a short recess.

10:00 A.M., May 15, 1974.

VERDICT OF THE JURY

4:08 P.M., May 15, 1974.

THE COURT: Madam Foreman, have you arrived at a verdict?

THE FOREMAN: Yes, Your Honor, we have.

THE COURT: Would you deliver it to the Marshal who will deliver it to the Clerk and if it is in proper form he will publish it.

THE CLERK: It's in proper form, Your Honor. United States of America vs. Billy Sunday Birt and Bobby Gene Gaddis, Criminal No. 74-3, Athens Division, "We, the jury, find the defendant Billy Sunday Birt guilty on Count 1, guilty on Count 2, guilty on Count 3, guilty on Count 4, guilty on Count 5, guilty on Count 6, guilty on Count 7, guilty on Count 8. We the jury find the defendant Bobby Gene Gaddis guilty on Count 1, guilty on Count 2, guilty on Count 3, guilty on Count 4, guilty on Count 5, guilty on Count 6, guilty on Count 7, guilty on Count 8. This 15th day of May, 1974, Delores Lindsay, Foreman. We concur," signed by the eleven other jurors.

THE COURT: Is there anything to come before the Court before the jury is discharged, gentlemen?

MR. MANN: No, Your Honor.

MR. WILCOX: No, Your Honor.

JURY DISMISSED.

SENTENCING

5:15 P.M., May 15, 1974.

THE COURT: All right, gentlemen, before we begin, the Court is required to advise each of you on account of the fact that you entered a plea of not guilty and then were convicted by a jury, that you have a right to appeal the verdict of the jury and the sentence imposed by the Court, and you may do that by instructing your Court-appointed counsel to file that notice of appeal for you. There responsibility, for your information, under the practice of this Court, continue through the appeal process. You may also instruct the Clerk of this Court to file a notice of appeal, and either one of them will file it. And you have, as to doing that, ten days from today—not counting today—within which time for that to be done.

That having been accomplished the Court will be pleased to hear from all of you gentlemen, the lawyers and the defendants as to the question what sentence should be imposed.

MR. MANN: Your Honor, of course there is nothing we can say about the trial. We entered our plea of not guilty and of course the jury has returned a verdict finding Mr. Gaddis guilty.

Your Honor, of course, has Mr. Gaddis' probation report. He does not have a conviction of any crime. I am sure that Your Honor is aware that he has been charged in several instances with crimes, however he has not until this day been convicted of any crimes.

Mr. Gaddis is 34 years old. As I recall he has been married to his present wife since he was very young—15, and I think she was 18. They have four children, ranging in age as I recall from somewhere around 16 down to 3, my best recollection.

The only thing I can ask the Court is that since this is his first conviction of any crime, I would ask the Court to be as lenient as possible.

I think Mr. Gaddis does have something to say.

DEFENDANT GADDIS: Judge, I ask you to be just as lenient on me as you could. God knows I am not guilty.

THE COURT: Mr. Wilcox?

MR. WILCOX: Your Honor, I would like to repeat again—it was mentioned in the trial, but Mr. Birt is also married, five children, they've been here throughout his trial. We asked for a trial by jury, that jury has returned a verdict, and we appear before you today ready for the sentence of the Court.

THE COURT: Mr. Birt?

DEFENDANT BIRT: Nothing to say.

THE COURT: Gentlemen, of course the hardest job that any Judge has is to sentence anybody. We have to decide questions of guilt or innocence. That's been decided in the case. Frankly, the Court could not argue with the verdict of the jury. We are not here to do that even if the Court could.

The Court would not be doing its duty if the Court were to in any way excuse what is obviously one of the most serious bank robberies that we've had, probably that we can ever have, where not only weapons were used by the life of a policeman is seriously endangered. And the Court in this case, even though it is familiar with the previous difficulties—I don't remember in particular what they are—those that came out on the trial, is not taking any of those into consideration. The Court is looking purely at this offense, what occurred, for which these gentlemen are found guilty by the verdict of this jury.

That being the case, the Court, as to each of the Counts for which these gentlemen were found guilty, to run concurrently, sentences each of these defendants to the custody of the Attorney General for twenty-five years.

That is the sentence of the Court.

Mr. Mann and Mr. Wilcox, the Court realizes that twenty-five years is the maximum, and the cases say that there is a merger of all of those offenses. If there is any question as the legality of that sentence, that's the Court's intention. We can get it straight on that.

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SUPREME COURT OF THE UNITED STATES

No. 74-1141

UNITED STATES, PETITIONER,

v.

BOBBY GENE GADDIS and BILLY SUNDAY BIRT

ORDER ALLOWING CERTIORARI. Filed May 27, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1141

UNITED STATES OF AMERICA,

Petitioner

V.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS

The Government's brief accurately refers to (1) the reported and unreported decisions below, (2) the jurisdictional basis for this Court's review, and (3) the relevant constitutional provision, statute and regulation involved.

QUESTION PRESENTED

Whether Milanovich v. United States, 365 U.S. 551, always requires a new trial when a defendant is convicted of the mutually exclusive offenses of bank robbery and possession of the proceeds of that robbery and, if it does so require, whether it should be overruled.

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

On March 6, 1974, according to the testimony of a number of government witnesses, the Bank of Loganville, Georgia was robbed by two armed robbers that entered the bank about 10:30 A.M. wearing ski masks. (T. 28, 39, 45, 50 and 55). In addition to the two armed robbers that entered the bank, there was a third masked person outside the bank who was driving what was reported to be a getaway car for the three. (T. 71, 84). During the course of the robbery, one robber held a number of employees at bay in the lobby of the bank with a pistol and the other robber vaulted the teller cage and emptied the cash drawers, taking an estimated $7,501.73. (T. 105).

When the two robbers entered the bank, they were yelling and giving orders (T. 55) and the robber who vaulted the teller cage ordered the tellers to lay down against the wall while he emptied the cash drawers. (T. 40, 43). Ms. Brooks, a teller at the bank, testified that this robber spoke in a deep voice and otherwise characterized the voice of the robber as gravely. (T. 40, 43).

On departing the bank the robbers encountered Officer Cody of the Loganville police and exchanged

gunfire with the officer. (T. 69). An eyewitness to the robbery, Robert Alton Webb, testified that the driver of the car had long brown hair and it might have been a woman. (T. 92). A number of marked bills described as bait money were taken from the bank by the robbers. (T. 107).

Billy Wayne Davis, Billy Sunday Birt and Bobby Gene Gaddis were charged with having committed the above described robbery. Billy Wayne Davis pled guilty to the charges and appeared at the trial of Birt and Gaddis as a witness for the government. (T. 157-204).

At the trial of Birt and Gaddis, F.B.I. Agent Kane testified that after receiving a report from Toccoa, Georgia, that Mrs. Mary Davis, the wife of Billy Wayne Davis, had deposited some of the bait money from the robbery in a Toccoa bank (T. 115) he visited the Davis home whereupon he discovered additional bait money in the Davis' freezer. (T. 135). Mrs. Mary Davis testified that she received the money from her husband, Billy Wayne Davis. (T. 145).

In the prosecution of its case, the government presented some twenty-two witnesses and of these witnesses only one, co-defendant Billy Wayne Davis, was able to identify either Birt or Gaddis as being present at the Bank of Loganville the day it was robbed. Furthermore, at the trial, a number of lay witnesses testified that Birt and Gaddis were in Winder, Georgia, on the date and at the time the Bank of Loganville, Georgia, was robbed. (T. 205, 211, 231, 251). In addition Birt and Gaddis each testified on their own behalf that they did not participate in the robbery. (T. 217, 237).

REASONS FOR NOT GRANTING THE WRIT

After a general introduction wherein petitioner suggests to this Honorable Court that justice should take a back seat to judicial economy they present a four-part brief in support of their 'Reasons for Granting the Writ' (petitioner's brief pp. 6-14). Part 1 merely relates to the Court the holdings of Heflin v. United States, 358 U.S. 415, (1959) and Milanovich v. United States, 365 U.S. 591 (1961). Part 2 suggests that because of a conflict in lower circuit courts decisions on the Heflin-Milanovich Rule this Court should grant certiorari. Part 3 is concerned with an effort to place this Court in the position of the jury requesting that the possession count be set aside in favor of the greater sentence of robbery. And, in Part 4 petitioner prays that if this Court does not find a conflict sufficient to grant the Writ then Milanovich should be re-examined. Respondents submit the following points for this Court's consideration.

1. There is no conflict in the lower courts.

a. United States v. Tyler, 466 F.2d 920 (9th Cir. 1972) certiorari denied, 409 U.S. 1045 (1972). Petitioner asserts that the Ninth Circuit would have decided the case at bar differently from the court below and they cite the Tyler decision in support of their contention. The Tyler court concluded that there is a distinction between using the words receiving and possession in the indictment in an attempt to circumvent the Heflin-Milanovich Rule. As pointed out in Judge Duniway's well reasoned dissenting opinion in that case, this approach clearly will not hold water. Tyler, supra, 925. Further, a more

recent decision, United States v. Faleafine, 492 F.2d 24 n.4 (9th Cir. 1974) casts some doubt on whether Tyler is the current approach the Ninth Circuit would give the aforestated rule. In short, the Ninth Circuit is the only circuit to even suggest this approach and more properly the response in the other circuits has been that of the Third Circuit in United States v. Roach, 321 F.2d, 1 (3rd Cir. 1963) wherein the appellate court directed a dismissal of the possession count and a new trial on the other counts. The court noted that it was a distinction without a difference that the defendant was charged with 'possession and concealment' in violation of 18 U.S.C. 2113(c) rather than with 'receiving' since the rationale of Heflin clearly indicates that sub-section (c) seeks to punish a new group of wrongdoers and not the accused bank robbers themselves.

b. Ethridge v. United States, 494 F.2d 351 (6th Cir. 1974), certiorari denied November 18, 1974 No. 74-5959. This case does not present a conflict either in that the Sixth Circuit concluded, as a discretionary matter, not to consider the issue before the court questioning the merger of counts for robbery and possession. Moreover, that case can be distinguished because the greater sentence of fifty years for murder was not under attack. Here, respondent has attacked the greater sentence of twenty-five years for bank robbery. A consideration of Ethridge is not appropriate here.

c. New trial not required where jury convicts of robbery or possession but not both. Petitioner cites

United States v. Dixon, 507 F.2d 683 (8th Cir. 1974) and United States v. Sharpe, 452 F.2d 1117 (1st Cir. 1971) in support of the foregoing proposition. Respondents do not contend otherwise but clearly this line of reasoning is inapplicable as suggesting a conflict in that the facts in Dixon and Sharpe are not in point. Respondents were convicted of both robbery and possession.

d. New trial is required where the jury is not told that it must not convict of both possession and the robbery itself. Petitioner concludes its conflict presentation by noting to this Court that the Fourth and Fifth Circuits require the result reached in the case below; we concur and would add to that list the following circuits with appropriate case citation.

THIRD CIRCUIT: United States v. Roach, 321 F.2d 1 (3rd Cir. 1963); United States v. Welty, 426 F.2d 615 (3rd Cir. 1970) (recognizing rule).

FOURTH CIRCUIT: United States v. Harris, 346 F.2d 182 (4th Cir. 1965); United States v. Lawrenson, 196 F. Supp. 838 (DC Md, 1961) (recognizing rule), affd. 298 F.2d 880, (4th Cir., 1961); cert. den. 370 U.S. 947.

FIFTH CIRCUIT: Baker v. United States, 357 F.2d 11 (5th Cir., 1966) (recognizing rule); Thomas v. United States, 418 F.2d 567 (5th Cir. 1969); Grant v. United States, 424 F.2d 273 (5th Cir. 1970) (recognizing rule), overruled on other grounds; United States v. Woodall, 438 F.2d 1317 (5th Cir. 1971),

cert. den. 403 U.S. 933; United States v. White, 440 F.2d 978 (5th Cir. 1971) (recognizing rule); Rose v. United States, 448 F.2d 389 (5th Cir. 1971)

SIXTH CIRCUIT: Matlock v. United States, 309 F. Supp. 398 (DC Tenn. 1970) (recognizing rule).

SEVENTH CIRCUIT: United States v. Parker, 181 F. Supp. 73 (DC Ind. 1960) (recognizing rule), affd 283 F.2d 862 (7th Cir. 1960), cert den 366 U.S. 937.

EIGHTH CIRCUIT: United States v. Jones, 418 F.2d 818 (8th Cir. 1969), (recognizing rule).

NINTH CIRCUIT: Keating v. United States, 413 F.2d 1028 (9th Cir. 1969); Clermont v. United States, 432 F.2d 1215, (9th Cir. 1970), cert den 402 U.S. 997, but see United States v. Tyler, 446 F.2d 920 (9th Cir. 1972).

TENTH CIRCUIT: Glass v. United States, 351 F.2d 678 (10th Cir. 1965) (recognizing rule); Jenkins v. United States, 361 F.2d 615 (10th Cir. 1966)

There is not a conflict on the issue presented in the case now pending before this Court, and therefore petitioner has failed to meet the requirement of presenting to this Court an issue of such a degree and significance that this Court should grant certiorari in the present case.

2. It is not necessary to re-examine Milanovich.

In Part 4 of petitioner's brief, they urge this Court

to grant the Writ for the purpose of re-examining Milanovich. A close view of the legislative history of 18 U.S.C. 2113(c) indicates that a re-examination of Milanovich is not necessary because the lower court in this instance properly applied the statute. Here, respondents rely on this Court's analysis of the legislative history of 2113(c).

> "Subsection (c) of §2113, with which we are now primarily concerned, came into the law in 1940. The legislative history is meagre. The Senate Report (S Rep No. 1801, 76th Cong. 3d Sess) is captioned 'Punishment for Receivers of Loot From Bank Robbers." The Report states, 'This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 fine and 10 years imprisonment, or both) to willfully become a receiver or possessor of property taken in violation of the statute,' p. 1. Similarly the House Report states 'Present law does not make it a separate substantive offense knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act, and this bill is designed to cover the omission.' HR Rep No. 1668, 76th Cong, 3d Sess, p.1.
>
> This clue to the purpose of Congress argues strongly against the position of the Government. From these Reports it seems clear that subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. It may be true that in logic those who divide up the loot following a robbery receive from robbers and thus multiply the offense. But in view of the legislative history of subsection (c) we think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." Heflin, supra. 419.

A recent decision by this Court clearly demonstrates the importance of legislative history in interpreting a law and determining its appropriate application. See

Iannelli v. United States, 73-64, decided March 25, 1975, 43 Law Week 4423 at 4427 and 4430.

In brief, the procedure suggested by petitioner, i.e., remanding to the district court for re-sentencing is inappropriate rather, a new trial is required in light of the ratio decidendi of this Court and the lower circuit courts' application of Heflin and Milanovich and the legislative history of the statute in question.

The question presented to this Court by petitioner is of no national import, there is no conflict of decisions in the lower circuit courts, and there is no necessity for clarification of the law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief upon Mr. Robert H. Bork, Solicitor General, by forwarding a copy of same to his office in Washington, D. C., with correct postage affixed thereto.

This 11th day of April, 1975.

Supreme Court, U. S.
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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 506 F. 2d 352.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1975 (Pet. App. B). By order of February 3, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 10, 1975. The petition was filed on that date and was granted on May 27, 1975 (A. 26). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether *Milanovich* v. *United States*, 365 U.S. 551, always requires a new trial when a defendant is convicted of the mutually exclusive offenses of bank robbery and possession of the proceeds of that robbery and, if it does so require, whether it should be overruled.

STATUTE INVOLVED

The federal bank robbery statute, 18 U.S.C. 2113, is set forth in the Appendix to this brief, *infra*, pp. 59–61.

STATEMENT

On February 25, 1974, respondents met Billy Wayne Davis at a truck stop in Winder, Georgia (Tr. 160–161, 243–244). Davis requested a sum of money that respondent Birt owed him (Tr. 160–161). Birt replied that he had no money but that there was a bank in Loganville, Georgia, which he thought could be robbed easily because the town had but one police officer (Tr. 161). After further discussion, respondents drove with Davis to Loganville to observe the bank (Tr. 162–163); they returned for additional observation each of the next two days (Tr. 166).

On February 28, 1974, respondents stole a Ford station wagon and a Ford sedan, which they intended to use in the robbery and the planned escape from Loganville to Winder (Tr. 166–168). During the morning of March 6, 1974, the trio drove to Loganville in three separate cars (Tr. 172). Respondent Gaddis drove his own car and parked it on a back road leading to Winder (Tr. 169, 172). The stolen Ford sedan

was left in a church parking lot on the main highway from Loganville to Winder (Tr. 169, 172). Armed with an assortment of handguns, a rifle and a double-barreled shotgun, the three drove into Loganville in the stolen Ford station wagon (Tr. 169–170, 172–174).[1]

After ascertaining the whereabouts of William Cody, Loganville's lone police officer, Davis and respondent Birt donned ski masks and gloves (Tr. 66, 173). Respondent Gaddis, wearing a long black wig (Tr. 173), drove them to an area behind the bank and parked the car (Tr. 174). Gaddis remained in the car while Davis and Birt, brandishing pistols, entered the bank (Tr. 174). Davis ordered everyone to lie on the floor while Birt looted the cashiers' drawers (Tr. 175–176). On a pre-arranged signal the two returned to the station wagon with $7,501.73 in cash and prepared to flee (Tr. 105, 176).

Alerted by police radio that the bank alarm had sounded, officer Cody drove to the scene of the crime (Tr. 67–68). When Cody approached the bank, respondent Gaddis fired the shotgun, striking the window on the right front door of the police car and wounding the officer in the face (Tr. 67–68, 75, 177). As the robbers drove off, respondent Birt fired a rifle at Cody, who lay on the ground near his car (Tr. 69, 177). Birt asked Gaddis to stop the car so that he could "have it out with the police" (Tr. 177). Gaddis

[1] Respondents had followed this same procedure, with the intention of robbing the bank, on both March 2 and 5. Because of various circumstances, however, they had not put their plan into action (Tr. 168–172).

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did not stop; he drove to the places where the cars had been left. The robbers retrieved and abandoned the cars in turn, ending with the car owned by Gaddis. The robbers finally divided the proceeds of the robbery equally (Tr. 178–180).

After receiving part of her husband's share of the proceeds, Davis's wife deposited several hundred dollars of this money in a bank in Toccoa, Georgia on March 8, 1974 (Tr. 114–115, 145). The deposit included "bait" money stolen in the robbery; the Toccoa bank notified the Federal Bureau of Investigation. An agent visited the Davis home and found additional "bait" money in a freezer (Tr. 135). Davis testified for the government at trial.[2]

A grand jury returned an eight-count indictment (A. 7–11) charging respondents and Davis with entering a federally-insured bank with intent to rob it by force and violence (Count 1) and robbing the bank by force and violence (Count 2), in violation of 18 U.S.C. 2113(a); with possessing the funds stolen in the robbery (Count 3), in violation of 18 U.S.C. 2113(c); and with assaulting four people with dangerous weapons during the course of the robbery (Counts 4 to 8), in violation of 18 U.S.C. 2113(d).

The evidence introduced at trial demonstrated that both respondents obtained their share of the proceeds by direct participation in the robbery. There was no evidence that either respondent received or possessed the proceeds in any other way; indeed, there was no

[2] Davis pleaded guilty prior to trial. He was sentenced to a term of 20 years' imprisonment.

evidence that the robbers even passed the proceeds among each other, except for the initial division.

The district court instructed the jury that the bank robbery statute, "read in a common sense fashion, makes each and every phase of the robbery of a bank * * * a crime" (A. 14). The court discussed the elements of the relevant portions of the statute. During its explanation of subsection (a), the court observed that "we have in that subsection two different crimes already" (*ibid.*). The jury then was instructed (A. 14–15) that subsection (c) provides that

> whoever receives, possesses, conceals, stores, barters, sells, or disposes of any money that is taken in violation of this law, knowing it to have been taken from a bank, is guilty of a crime. Another crime—a separate crime.

After its initial explanation of the elements of subsection (d), which punishes assaults committed during a bank robbery, the court stated (A. 15):

> So that's another crime against the United States. So you see, it's like turning on a water hose and the water flows. In this case Congress has by law determined that there are a series of crimes that can be committed—separate crimes—in the course of robbing a bank.

The court did not instruct the jury that conviction on the robbery counts would preclude conviction on the possession count, or that the crime of possession created by Section 2113(c) was directed against a class of offenders other than those who had participated in the robbery itself. Following its charge to the jury, the court asked for exceptions or additions to the

charge. Counsel for respondents neither objected nor offered additional instructions (A. 22–23).

The jury convicted both respondent on all counts (A. 23). At sentencing, the court remarked upon the serious nature of respondents' crimes and imposed on each respondent terms of 20 years' imprisonment for aggravated bank robbery (2113(a)), 25 years' imprisonment for assault in the course of the bank robbery (2113(d)), and 10 years' imprisonment for possession of the proceeds (2113(c)), all sentences to run concurrently (A. 25). The trial judge stated (*ibid.*):

> [T]he court realizes that twenty-five years is the maximum, and the cases say that there is a merger of all of those offenses. If there is any question as to the legality of that sentence, that's the Court's intention.

The court of appeals reversed (Pet. App. A). Although respondents had not objected to the instructions, the court held that it was plain error to permit the jury to convict of both taking and possessing the proceeds of the same bank robbery. Relying on *Milanovich* v. *United States,* 365 U.S. 551, and *United States* v. *Abercrombie,* 480 F.2d 961 (C.A. 5), certiorari denied, 414 U.S. 1008, the court went on to hold that, because there were no means for determining what verdict a properly instructed jury would have returned, and because the jury's verdict was inconsistent, "the proper appellate remedy is to remand for a new trial" (Pet. App. 18).

SUMMARY OF ARGUMENT

In *Holiday* v. *Johnston,* 313 U.S. 342, and *Prince* v. *United States,* 352 U.S. 322, the Court held that

various combinations of subsections of the federal bank robbery act state simply different degrees of the crime of bank robbery. The Court has recognized one exception to this rule: subsection (c), which forbids possession of proceeds taken in the robbery, creates a separate offense "for those who receive the loot from the robber" (*Heflin* v. *United States,* 358 U.S. 415, 419).

Respondents were charged both with several degrees of bank robbery and with possession of the proceeds. The district court instructed the jury that each subsection creates a separate offense, and the jury convicted on all counts. The court then treated all counts as "merged" and gave a general sentence. The court of appeals thought that the multiple conviction could be rectified only by a new trial; it relied for this proposition upon *Milanovich* v. *United States,* 365 U.S. 551.

Milanovich dealt with convictions for larceny and receiving the proceeds (both in violation of 18 U.S.C. 641). The larceny count and the receiving count serve roles corresponding to the robbery and possession subsections of the bank robbery statute, as *Milanovich* itself held (365 U.S. at 554). This Court held in *Milanovich* that, at least on the facts before it, the trial judge should have instructed the jury that it could convict of either the larceny or the receipt of the proceeds, but not of both. Because the court did not so charge, the jury returned the "inconsistent" verdicts of guilty on both counts; this Court held that the proper remedy was to remand for a new trial at which the jury would be given proper instructions.

I

Milanovich involved facts different from those of the instant case, and, we submit, it does not control here. In *Milanovich,* the evidence adduced at trial demonstrated (if believed by the jury) that Mrs. Milanovich was a passenger in what was to be used as the getaway car in a larceny. The getaway car left prematurely. Seventeen days later Mrs. Milanovich retrieved the loot from its hiding place. These were two independent transactions proved at trial with independent evidence. It would have been quite possible for the jury to conclude that she had engaged in one transaction but not the other.

The Court held that, as a matter of statutory construction, Mrs. Milanovich could not be punished for both offenses. At the same time, however, the Court concluded that the jury should be accorded essentially unguided discretion to choose between these possible offenses. Because, in light of this discretion, an appellate court could not tell which offense a properly instructed jury would have selected, the Court remanded for a second trial at which a new jury would be given the opportunity to choose.

By contrast, all of the evidence introduced at respondents' trial demonstrated (if believed by the jury) that respondents had perpetrated the robbery and escaped with the proceeds. The evidence established but a single transaction; there was no proof that respondents had possessed the proceeds at any later date. On these facts the jury had no discretion to exercise. If the jury that tried respondents had concluded that they did not commit the robbery, there would have been insufficient evidence to convict them of possession, and the jury would have been required by the instructions to acquit them of all charges. On the other hand, if the jury had concluded (as it did) that respondents were the robbers, then any separate conviction for possession would be precluded by the federal bank robbery act itself; the legislative history of Section 2113, as interpreted in *Heflin,* indicates that Congress has not authorized cumulative punishments for those who have been convicted of bank robbery. No matter how this case is approached, then, respondents' conviction for possession would have been improper, and speculation into the jury's deliberations unnecessary. The correct remedy is to vacate the surplus conviction.

This argument is supported by the common law treatment of the relationship between theft crimes and possession crimes. At common law, an individual who did not participate in the robbery proper could be convicted of both robbery (as an accomplice) and any subsequent possession. Because the punishments could be cumulative, there was no priority of consideration between the offenses. On the other hand, the robber himself could not be punished for possession of his booty as a separate offense; if he was convicted of both crimes, courts affirmed the robbery conviction and vacated the possession conviction.

Milanovich was a case of the former type; Mrs. Milanovich had not participated in the larceny itself. The Court rejected the common law rule that would have permitted double conviction and cumulative

punishment. Having done so, it was left without a rule of priority between offenses; rather than establishing such a rule, it left to the jury's discretion the question whether Mrs. Milanovich should be convicted of larceny or of receipt. However, the common law does provide a rule of priority in cases like the instant one, where the defendant participated in the robbery as a principal, and the Court should adopt it. If the jury has found an individual guilty of the robbery itself, it should convict on that count. A district court or an appellate court can achieve the same end when the jury has rendered verdicts of guilty of both offenses by vacating the subordinate possession conviction, and there is no need for a second trial.

II

If the Court should conclude that *Milanovich,* if followed, requires retrial in *all* cases of conviction of both theft and possession of the proceeds thereof, it will be necessary for the Court to consider whether *Milanovich* should be overruled. We submit that it should.

A. *Milanovich* held that the jury should be told that it can convict of either larceny or receipt but not of both. However, this "either/or" instruction creates two important problems. First, it does not inform the jury which of the two offenses it should initially consider; *Heflin* and the legislative policy *Heflin* reflects indicate that it should consider robbery first. Second, the either/or instruction creates nagging double jeopardy problems. It tells the jury to "acquit," or simply fail to return a verdict, on one of the counts. If the

charge on which the defendant is convicted later is (for reasons that would not infect a conviction for the other offense) reversed on direct appeal or vacated on collateral attack, or if a new trial is granted because of newly-discovered evidence bearing only on the count selected by the jury for conviction, it may be difficult if not impossible to retry the defendant for the other offense. Thus, even if the evidence would fully support a possession conviction, the jury's "acquittal" (actual or constructive) on that count, resulting from its selection of the robbery count, could block further prosecution. A jury instruction that could operate to prevent a guilty individual from being punished should be avoided whenever possible.

What is more, the either/or instruction is not addressed to the problem identified by *Heflin*—the need to prevent cumulative punishment of those who have committed but a single offense. The problem of cumulative punishment can be dealt with adequately by the judge. It is possible for an individual, during the course of a single criminal transaction, to violate many of the sections of the federal bank robbery act. None of the interests articulated in *Heflin* are jeopardized by allowing the jury to fulfill its usual role of determining whether, beyond a reasonable doubt, an accused committed the acts that would violate any given subsection.

The jury should be allowed to return a verdict concerning each set of facts alleged to constitute an offense; only in this way can we be sure how it evaluated the facts. Moreover, this practice carries no perceptible costs. The circumstances of theft/posses-

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sion cases are such that it is hard to see how any of the jury's verdicts could "infect" another verdict; there is thus no reason to suppose that allowing a jury to return a verdict, even on a count that turns out (in light of other verdicts) to have been irrelevant or superfluous, will produce erroneous verdicts on any other count.

Once the jury has returned its verdicts, the judge can enter judgments according to the bank robbery act. For example, when the jury returns verdicts of guilty of both robbery and assault during the course of a robbery, the trial judge, following *Prince*, should enter a single judgment, treating the offenses as merged. It is not necessary to tell the jury that the offenses *will* merge, for the judge can accomplish that result. Similarly, because under *Heflin* the offense of possession is committed only by one who receives the loot from the robber, when the jury convicts of both robbery and possession the judge should enter a single judgment of conviction for robbery, in accordance with the rule of priority.

B. Even if an either/or instruction should be given, it does not follow that a new trial automatically must be used as a remedy. The district court or an appellate court can apply the *Heflin* rule and vacate any judgment convicting a robber of possession. This will eliminate both multiple convictions and the possibility of cumulative punishment; a remand for resentencing (when necessary) will allow the district court to enter the appropriate sentence.

Because any error in neglecting to give the jury an either/or instruction can be so easily, and so completely, rectified, a new trial is unnecessary. It is also undesirable; new trials are costly to the defendant, to the government, and to the system of justice itself. They are rightly used only when an error at trial has prevented an accused from receiving a fair trial, and the absence of an either/or instruction does not imperil such an interest or give rise to a suspicion that the jury's conclusion that a defendant has committed the acts alleged is anything other than accurate.

The *Milanovich* Court did not consider the costs of second trials. It did, however, advance several reasons for requiring a new trial, including that inconsistent verdicts were impermissible and that a properly instructed jury might have acquitted altogether. But the verdicts are not factually inconsistent; in any event, in a long line of cases—none of them adverted to in *Milanovich*—this Court has held that verdicts are not defective simply because they are inconsistent. And the idea that a jury convinced beyond a reasonable doubt that an accused had both robbed a bank and possessed the proceeds would, if instructed that it could convict of but one of these offenses, decide to acquit of both, attributes to the jury a degree of illogic unknown to our law. When this Court held that the Sixth Amendment right to trial by jury applies to the States, it forcefully pointed out that the system of trial by jury is undergirded by a belief that juries, perhaps more so than judges, can be relied upon to decide controversies fairly, reasonably, conscientiously and intelligently. *Duncan* v. *Louisiana*, 391 U.S. 145, 147.

We submit that, upon reexamination, the Court should conclude that the arguments supporting the result in *Milanovich* are contrary to principles accepted elsewhere in the criminal law. The case should be overruled.

III

If, in spite of the arguments we have advanced above, the Court should conclude that the respondents must be tried a second time, we respectfully request it to make clear what issues are open on that retrial.

This is not an ordinary criminal case in which errors committed during trial have infected the fact-finding process. The lack of an either/or instruction creates no reason to doubt the accuracy of the jury's verdict that, beyond a reasonable doubt, respondents committed the acts alleged in the indictments. The only problem presented by this case is that the jury was not asked to express a preference between offenses.

We submit that this statement of the flaw suggests the scope of the remand: the jury should be told, at the second trial, that a previous jury already has determined that respondents are guilty, and that its only task is to select the crime on which respondents shall stand convicted. In other words, the option of absolute acquittal on all charges should not be accorded the second jury.

Although this may seem an unusual procedure to follow in criminal cases, it is unusual only because almost all reversals in criminal cases occur in response to errors that could have affected the jury's

fact-finding decisions. This error does not. The procedure we seek is similar to that used in civil cases in which an appellate court concludes that the jury was improperly instructed on the question of damages (the remedy). Such cases are routinely returned to the district court for a second trial confined to the question of damages—the second jury is instructed to accept as given the first jury's verdict on liability. Here, too, the jury has been improperly instructed only on the question of what it should do with the facts it finds. The terms of remand should be the same—a second trial limited to the question of the judgment to be entered, at which the issue of liability is accepted as settled by the first jury. There is neither justification nor occasion for providing to respondents the possibility of a windfall acquittal because, during the interim between trials, evidence may have dissipated or memories dimmed. Respondents have had a fair trial at which the prosecution convinced a jury of their guilt; there is no need to put that same question to another jury.

ARGUMENT

The court of appeals has decided that respondents must be tried a second time because the jury at their first trial was not informed that it could convict them either of bank robbery or of possession of the proceeds, but not of both crimes. The court relied upon *Milanovich* v. *United States,* 365 U.S. 551, in support of its decision.

Several premises underlie the holding of the court of appeals. The first is that *Milanovich,* which dealt

with a larceny statute (18 U.S.C. 641), applies to violations of the federal bank robbery act. The court of appeals, following *United States* v. *Abercrombie,* 480 F. 2d 961 (C.A. 5), certiorari denied, 414 U.S. 1008 held that it does. We agree with this proposition.[3] The two sets of crimes are functionally interchangeable for *Milanovich* purposes; larceny bears the same relation to receipt of the proceeds as does bank robbery to possession of the proceeds. Indeed, *Milanovich* itself so recognized (365 U.S. at 554). For purposes of this brief, therefore, we shall treat *Milanovich* as if the Court had dealt directly with the federal bank robbery act.

The court of appeals' second proposition was that *Milanovich* required reversal on the facts before it. For the reasons we discuss below, this proposition is incorrect; *Milanovich* should be applied only to those cases in which a jury may properly be accorded unguided discretion to choose between offenses charged. Where, as here, the evidence introduced at trial shows but a single criminal transaction and there is no independent evidence of possession, the jury should not have this discretion. The proper remedy is to vacate

[3] *United States* v. *Tyler*, 466 F. 2d 920 (C.A. 9), certiorari denied, 409 U.S. 1045, and *Gentry* v. *United States*, 386 F. Supp. 1126 (E.D. Tenn.), hold that *Milanovich* is confined to violations of Section 641. Other courts to consider the question have held otherwise, and several have expressly rejected the *Tyler* approach. See, *e.g.*, *United States* v. *Sellers*, C.A. 4, No. 74-1683, decided April 10, 1975, petitions for writs of certiorari pending, Nos. 74-1476 and 74-6503; *Abercrombie*, *supra*. But cf. *United States* v. *Dixon*, 507 F. 2d 683 (C.A. 8), petition for a writ of certiorari pending, No. 74-5869.

the conviction for possession and to leave the robbery conviction undisturbed.

The third principle supporting the decision below is one beyond the control of the court of appeals—that court assumed, as was required, that *Milanovich* still is good law. We respectfully submit that *Milanovich* was decided incorrectly and urge that it be overruled in its entirety, both to clear away the tangled webs spun by courts attempting to adhere to its dictates and to bring the law of bank robbery into accord with principles that prevail elsewhere in the criminal law.[4]

[4] The lower courts have adopted a variety of conflicting approaches to the problems presented by *Milanovich*. In the Fifth Circuit, a new trial is required whenever the jury is not told that it must not convict of both possession and the robbery itself. *E.g.*, *Abercrombie*, *supra*; *Thomas* v. *United States*, 418 F.2d 567 (C.A. 5); see *United States* v. *Jones*, 418 F.2d 818 (C.A. 8). The Fourth Circuit recently rejected this view (which it had previously adopted. *United States* v. *Harris*, 346 F.2d 182) in *United States* v. *Sellers*, *supra*.

Other courts have held that when the sentences under the robbery and possession counts are concurrent and of equal length, further inquiry into the charge to the jury is unnecessary. See, *e.g.*, *Ethridge* v. *United States*, 494 F.2d 351 (C.A. 6), certiorari denied, 419 U.S. 1025; *Gentry* v. *United States*, *supra*. But this approach has been expressly rejected by *Glass* v. *United States*, 351 F.2d 678 (C.A. 10), and *United States* v. *Roach*, 321 F.2d 1 (C.A. 3), both of which hold that a new trial is required on all counts because, if a properly instructed jury had returned a different verdict, a different sentence might have been imposed. See also *Keating* v. *United States*, 413 F.2d 1028 (C.A. 9).

Another line of cases holds that, regardless of the instructions given to the jury, if that jury convicts of robbery or possession, but not both, a new trial is not required. See, *e.g.*, *United States* v. *Dixon*, 507 F.2d 683 (C.A. 8), petition for a writ of certiorari pending, No. 74-5869; *United States* v. *Sharpe*, 452 F.2d 1117, 1119 (C.A. 1); *United States* v. *Ploof*, 464

I

THE *MILANOVICH* DECISION DOES NOT REQUIRE A NEW TRIAL ON THE FACTS OF THIS CASE

A close examination of *Milanovich* leads to the conclusion that the reinstatement of respondents' robbery convictions would not be inconsistent with that case. In *Milanovich* the defendants (husband and wife) drove three confederates by car to a United States Naval Commissary, the site of a planned theft, and (according to plan) were to wait outside for the return of their accomplices after the theft was accomplished. After a short wait the defendants became frightened and left prematurely. When their accomplices discovered that the getaway car had left without them, they buried the loot. Seventeen days later, Mrs. Milanovich retrieved the buried money, which federal agents subsequently discovered during a search of her house.

Both defendants were convicted of larceny; the trial judge acquitted Mr. Milanovich with respect to the receiving count but allowed the jury to convict Mrs. Milanovich of receiving and concealing the pro-

F.2d 116 (C.A. 2) (by implication); cf. *United States* v. *Neighbors*, C.A. 8, No. 74–1616, decided May 14, 1975.

Finally, one case now has raised the possibility that an individual accused of possession of the proceeds can defend by claiming that he is, in fact, a robber. *Phillips* v. *United States*, C.A. 4, No. 73–2516, decided June 3, 1975 (*en banc*). But see *Sharpe*, *supra*.

We are furnishing to counsel for respondents a copy of our petition in *Sellers*. We are preparing a petition for a writ of certiorari in *Phillips* and will furnish counsel for respondents with a copy when it is filed.

ceeds. The district court sentenced Mr. Milanovich to a term of five years' imprisonment for larceny; Mrs. Milanovich received concurrent terms of five years' imprisonment for receipt of the proceeds and ten years' imprisonment for larceny. Relying on *Heflin*, the court of appeals vacated Mrs. Milanovich's conviction for receipt of the proceeds.

In a five-to-four decision, this Court agreed that the *Heflin* principle applied to the larceny statute and precluded the conviction for both larceny and receipt. The Court went on to hold that the proper remedy was not simply to vacate one of the sentences but to remand Mrs. Milanovich's case for a new trial on both counts. The majority opinion first emphasized that, contrary to the government's assertions, defense counsel had adequately made clear, during the trial, its position that a thief could not be convicted of receiving from himself (365 U.S. at 552–553). Then, after finding that "the evidence was sufficient to support a conviction for either larceny or receiving" (365 U.S. at 554), the Court explained why a new trial was necessary (*id.* at 555–556):

> Though setting aside the shorter concurrent sentence imposed upon the wife for receiving, the Court of Appeals left standing a ten-year prison term for larceny, double the punishment that had been imposed upon the husband for the identical offense. Yet there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither). Thus we cannot say that the mere setting aside of the shorter concurrent sentence sufficed to cure any

> prejudice resulting from the trial judge's failure to instruct the jury properly. It may well be, as the Court of Appeals assumed, that the jury, if given the choice, would have rendered a verdict of guilty on the larceny count, and that the trial judge would have imposed the maximum ten-year sentence on that count alone. But for a reviewing court to make those assumptions is to usurp the functions of both the jury and the sentencing judge.

The most important predicate for the decision in *Milanovich* was, apparently, that neither of the offenses Mrs. Milanovich had committed could be given priority over the other. The Court presumably would not have concluded that vacating one of the convictions would usurp the role of the jury or require speculation into its conduct if the jury had no discretion in its actions. In other words, if some rule creates a priority of consideration between two offenses submitted to a jury, requiring the jury to turn its attention to one of them first, it would be a simple matter for a court to affirm by enforcing the jury's conviction on the "first priority" offense and vacating the other conviction. For example, when a jury erroneously is allowed to convict of both a greater and a lesser included offense, a reviewing court routinely vacates the conviction for the lesser offense and allows the conviction on the greater to stand.[5] This function neither usurps the jury's discretion—properly instructed it would have had none to exercise—nor involves speculation into the jury's resolution of disputed facts, for the jury already has

[5] A more complete discussion of the law of lesser included offenses appears at pages 42–43, 45–47, *infra*.

resolved the facts and presented its verdicts. Because *Milanovich* did not follow this well-beaten path of vacating one of the two convictions, we infer that the Court must implicitly have held that there was no priority of consideration between Mrs. Milanovich's crimes.[6]

This lack of priority is apparently at odds with *Heflin* v. *United States*, 358 U.S. 415, which held that "subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. * * * [W]e think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves" (358 U.S. at 419–420). The *Heflin* Court, dealing directly with offenders who (like respondents) actively participated in the robbery, recognized that subsection (c) reaches only those "who receive the loot from the robber." We think this language, when read in context and in light of the near-universal rule that the offense with the higher authorized penalty is established as the offense to receive priority of consideration, extends such priority to the offense of robbery; only an accused who has been convicted of robbery is incapable of committing the offense of possession of the proceeds. The Court's action accorded with its words;

[6] This conclusion is reinforced by the fact that the Court reached its decision in the face of the specific complaint in the dissenting opinion of Mr. Justice Clark that "the jury is invited to consider counts not factually inconsistent, and in such sequence as it chooses, with no more reason to convict on one rather than another * * *." 365 U.S. at 564.

it vacated Heflin's conviction for possession and left standing his conviction and sentence for robbery of the bank.[7]

We suggest, therefore, that if there had been a rule of priority between Mrs. Milanovich's offenses, a second trial would have been unnecessary. The case is distinguishable on that ground: There is (or should be) a priority between respondents' offenses.

A. IN *MILANOVICH*, THE CRIMES WERE SEPARATE TRANSACTIONS ESTABLISHED WITH SEPARATE EVIDENCE; HERE, THERE IS BUT A SINGLE TRANSACTION

Milanovich did not deal with a case like the present one. Mrs. Milanovich was tried and convicted of two separate offenses (her presence in the getway car, and the subsequent exhumation of the proceeds); the offenses were distinct in time (17 days apart) and were proved at trial by discrete evidence. None of the

[7] *Milanovich* suggested (365 U.S. at 555) that the *Heflin* Court selected this remedy because of the limits imposed by Fed. R. Crim. P. 35. We do not think that this affects our discussion of *Heflin*. The Court proceeded under Rule 35 only because a majority of the Court did not believe that 28 U.S.C. 2255 could provide relief from a sentence to be served in the future. (That portion of *Heflin* was overruled by *Peyton* v. *Rowe*, 391 U.S. 54.) But *Heflin* was before the Court under Section 2255, and Heflin was serving his sentence for robbery; the Court could, if it wished, have set aside his robbery sentence and affirmed his sentence for possession. Alternatively, it could have set aside his sentence for robbery under Section 2255 and his sentence for possession under Rule 35 and required the government to retry Heflin or free him. Finally, even if it is not possible to infer a rule of priority from the remedy selected in *Heflin*, the language of *Heflin* and the legislative policy considerations on which it relies rather clearly suggest the same rule.

evidence establishing Mrs. Milanovich's presence at the getaway car established her part in the recovery of the loot, and vice versa. It would have been quite logical for the jury to have convicted her of both larceny and possession, of larceny alone, of receipt alone, or of neither on the facts presented, without the slightest factual inconsistency.

Here, by contrast, all of the evidence at trial went to respondents' participation in the robbery. There was no evidence that respondents possessed the proceeds other than during the robbery, the getaway, and the division of the loot. Respondents' shares—unlike Davis's share—were never located. The central, indeed, the exclusive, issue argued by counsel at trial was whether respondents participated in the bank robbery (Tr. 272–315). As both prosecution and defense counsel repeatedly stated (Tr. 283, 287, 288, 302, 308) the question the jury had to decide was whether respondents had been convincingly identified as the robbers of the bank.

If (as the jury determined) respondents are guilty as robbers, a jury properly instructed under *Heflin* would have convicted them of that crime. They stand so convicted and, because of that conviction, cannot also be found to have committed the crime of possession of the proceeds. Indeed, it would have been proper in this case, quite unlike the case in *Milanovich*, not to submit the possession count to the jury at all, for if the jury had concluded that respondents were not the robbers, there would have been no independent evidence from which the jury could have concluded that they possessed the proceeds at any time.

It would not have been logically possible for the jury to acquit respondents of robbery and to convict them of possession on the facts presented at trial.

Because *Milanovich* involved separate criminal transactions proved at trial with separate evidence, it was arguably appropriate for the Court implicitly to conclude that there was no priority between the offenses and to allow the jury to express a preference unbridled by rules of priority. But such an outcome is inappropriate where, as here, there was but a single criminal transaction and no separate evidence of possession. The Court should treat this case as if a count unsupported by the evidence (the possession count) had been submitted to the jury. In such cases the unsupported count is routinely vacated and the supported count affirmed; there is no presumption that one count affected the jury's consideration of another.[8]

[8] In certain instances there should perhaps be a remand for resentencing when an appellate court vacates a conviction for possession. Remand would appear to be unnecessary in this case, however, since the possession conviction plainly did not cause enhancement of the sentence. In addition to the single conviction of possession, respondents were convicted of seven counts of aggravated bank robbery. At sentencing, the district court observed (A. 25) that respondents' crime was "one of the most serious bank robberies that we've had, probably that we can ever have, where not only weapons were used by [sic] the life of a policeman is seriously endangered." The court therefore sentenced respondents to a term of 25 years' imprisonment, the maximum allowable when an assault is committed during the robbery, in violation of 18 U.S.C. 2113(d). It then stated that, according to case law, there was a "merger" of all offenses. The 25-year sentence was imposed because of the aggravated nature of the entire criminal transaction, and the possession conviction—which was not based on evidence of any additional offense or continuing attempts at concealment—was not a separate consideration in the mind of the court.

In *Milanovich*, by contrast, the Court noted (365 U.S. at 555–556) that the receipt conviction might have caused the trial judge to increase the punishment for larceny, which was "double the punishment that had been imposed upon the husband for the identical offense" (365 U.S. at 555).

As a practical matter, it would rarely make any difference whether or not there is a remand for resentencing in cases involving this particular problem. If the vacation of the possession count were a development that would lead the sentencing judge to impose a reduced sentence on remand, the judge presumably would by the same token grant such relief on a motion for a reduction of sentence pursuant to Fed. R. Crim. P. 35 even if the court of appeals did not remand for resentencing.

The same principle is supported by the concurrent sentence doctrine. This Court has been unwilling to assume that the submission of a bad count to a jury spoils the jury's verdict upon an otherwise proper count (see note 19, *infra*). The Court has, instead, limited its inquiry in most cases to the question whether the improper count has led to an increase in the sentence.

B. THE COMMON LAW ESTABLISHES A RULE OF PRIORITY THAT APPLIES TO THE INSTANT CASE BUT NOT TO A CASE LIKE *MILANOVICH*

We have argued above that the fact patterns of *Milanovich* and of this case are sufficiently unlike that the difference in facts justifies a difference in outcome. We now suggest that the disinclination of *Milanovich* to create a rule of preference between that defendant's offenses may have had its roots in the common law. If that is so, then the common law equally distinguishes this case from *Milanovich*, for when a robber (as distinct from an accomplice) is convicted of both robbery and the ensuing possession,

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the accepted remedy is to set aside the possession conviction and allow the robbery conviction to stand.

At common law, larceny (or robbery) and receipt (or possession) of the proceeds were distinct crimes. An individual who did not participate in the asportation of the booty from the scene of the robbery could commit both crimes. The common law courts in England and in most States reasoned that one could be guilty of the crime of robbery (as an accomplice) without touching the proceeds; it followed, therefore, that it could be a separate crime to come into possession of and harbor what had been stolen. See, *e.g.*, the cases collected in 2 Wharton, *Criminal Law and Procedure* § 576 (Anderson ed. 1957); 10 Halsbury, *Laws of England* §§ 1565–1571 (Simonds ed. 1955); Annotation, 136 A.L.R. 1087, 1094–1104 (1942). Because conviction and punishment (even consecutive punishment) would lie for both crimes, there was no priority between them.

Under federal theft statutes, some of the common law principles were retained and some abandoned. In conformity with the common law practice, one involved in a robbery as a principal and so convicted could not also be punished as a receiver or possessor. And, as interpreted in *Heflin,* an accessory to the crime could be guilty either as a robber or as a possessor if he received the loot from the robber.[9] *Heflin*

[9] We do not imply, nor did *Heflin* hold, that an individual accused under Section 2113(c) can defend against that charge by claiming that he was, in fact, the robber. *Heflin* simply held that an individual cannot be convicted of both offenses, for that would multiply the punishment of the robber. However, a conviction for possession of the proceeds of the robbery recently

(as interpreted in ***Milanovich***) modified the common law rule, however, by holding that while an accessory to the theft could be convicted of either the theft or of the receipt of the proceeds, he could not be convicted of both crimes.

Milanovich thus disapproved the common law rule to the extent that rule would have allowed both of Mrs. Milanovich's convictions to stand. Having rejected that option, the Court was faced with the question of disposition. Had it recognized a principle of priority, it could have permitted the prime conviction to stand while vacating the secondary conviction. As we read ***Milanovich***, all the Court did was to decline to establish such a rule of priority; consequently, it remanded to allow a jury to express a preference.[10] That is the procedure used when an individual is convicted of being an accomplice to the theft and of subsequent receipt of the proceeds in the few States that permit conviction on only one count and at the same time have no preference rules. See ***Shepp*** v. ***State,*** 484 P.2d 563 (Nev. Sup. Ct.); ***State*** v. ***Koton,*** 202 S.E.2d 823 (W. Va. Sup. Ct.); ***People*** v. ***Perez,***

was reversed by the *en banc* Court of Appeals for the Fourth Circuit, with three judges subscribing to the theory that proof of participation in the robbery establishes a defense to a charge of possession of the proceeds. *Phillips* v. *United States*, *supra;* contra, *United States* v. *Sharpe*, *supra.*

[10] Of course, 18 U.S.C. 2 punishes accomplices as if they were principals. See *Milanovich*, *supra*, 365 U.S. at 554, n. 5. This does not detract from the fact that Mrs. Milanovich was an accomplice as that term is understood at common law; there is no reason why the common law rules should be affected simply because an accomplice is made liable to the same punishment as a principal.

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40 Cal. App. 3d 795, 115 Cal. Rptr. 405. It arguably is especially appropriate where, as in *Milanovich,* the court imposed sentences of unequal length.

The result in *Milanovich* is thus most readily explicable in terms of that defendant's status as an accomplice rather than a principal in the theft. The accused thief cannot be convicted of both offenses, and there is a clear rule of priority—the first question to be answered is whether the accused stands convicted as a thief. If the answer is "yes," then it is impossible to convict him of possession of the proceeds. The rationale for this rule is quite straightforward. Theft cannot be completed without asportation of the proceeds, so that any thief who participates in the asportation necessarily possesses the proceeds at some time. To convict a thief of both the theft and the possession would be duplicitous. See, *e.g.,* Wharton, *supra;* Halsbury, *supra. Heflin* adopted this rule, although it derived the rule from the statute's legislative history rather than from the common law.

The remedy prescribed by the common law is the same as the remedy selected in *Heflin:* the conviction for possession is vacated and the conviction for robbery allowed to stand. Once the jury has concluded that the accused was a participant in the robbery, a separate sentence for possession is improper; but there is no need to remand for a new trial to achieve that result. *Milanovich* remanded for such a trial because it was difficult to ascertain which count a jury, given free choice, would have selected. There may have been "free choice" on the facts of *Milanovich* itself, but there is no comparable "free choice" when the accused

participated in the robbery itself; the jury's *only* choice, under proper instructions, would have been to convict of robbery.

The jury in this case, properly instructed concerning the elements of bank robbery, concluded that, beyond a reasonable doubt, respondents were robbers. Because of the distinctions discussed above between this case and *Milanovich,* the jury's verdict was sufficient to allow the district court or a court of appeals to apply the rule of priority drawn from the common law and articulated in *Heflin,* and thus to sustain the robbery conviction. State courts follow the same path. See, *e.g., State* v. *Fioravanti,* 46 N.J. 109, 215 A. 2d 16 (Weintraub, C. J.); *State* v. *Botta,* 27 Ohio St. 2d 196, 271 N.E. 2d 776; *People* v. *Daghita,* 301 N.Y. 223, 93 N.E. 2d 649 (Fuld J.); *People* v. *Colon,* 28 N.Y. 2d 1, 318 N.Y.S. 2d 929, 267 N.E. 2d 577, certiorari denied, 402 U.S. 905; *Gossett* v. *State,* 224 Tenn. 374, 455 S.W. 2d 585; *Mercer* v. *Commonwealth,* 330 S.W. 2d 734 (Ky. Sup. Ct.) (by implication); *Wells* v. *State,* 127 Ga. App. 109, 192 S.E. 2d 567; *People* v. *Lamirato,* 180 Colo. 250, 504 P. 2d 661; *State* v. *Flint,* 4 Wash. App. 545, 483 P. 2d 170.

II

IF *MILANOVICH* REQUIRES A SECOND TRIAL OF RESPONDENTS THEN *MILANOVICH* SHOULD BE OVERRULED

We have argued above that *Milanovich* governs only when the evidence discloses that the robbery and the possession arose out of two essentially unconnected transactions. This is not such a case. However, should

the Court disagree with the interpretation of *Milanovich* that we have offered above, we submit that it should reexamine and overrule that case. We begin our discussion of that possibility by analyzing the soundness of the "either/or" instruction itself. We then contend that, even if it is proper to give the instruction, failure to do so should not necessitate a retrial.

A. THERE IS NO NEED TO INSTRUCT A JURY THAT IT CAN CONVICT OF ROBBERY, OR OF POSSESSION, BUT NOT BOTH

1. *The either/or instruction misinforms a jury about the law's commands and creates unnecessary risks of freeing guilty individuals*

The either/or instruction has, as we see it, two important vices. On the one hand, it neglects to inform the jury about the priority rule created by *Heflin* and the common law; if any instruction in this form is to be given, it should be more complete. On the other hand, by informing the jury that it should acquit the accused on all alternative charges, it creates a distinct possibility that guilty individuals may escape punishment altogether. We expand upon these concerns below.

a. The either/or instruction, as formulated in *Milanovich,* gives to a jury essentially unguided discretion to convict of one offense or the other. Indeed, it was in large part just this supposed discretion that led the *Milanovich* Court to conclude that Mrs. Milanovich had to be retried. But neither *Heflin* nor the common law necessarily creates complete discretion, and, we submit, it is misleading for a district court to give an either/or instructon without indicating how the discretion is to be exercised. See *Milanovich, supra,* 365 U.S. at 564 (Clark, J., dissenting). The underlying principle that informed both *Prince* v. *United States,* 352 U.S. 322, and *Heflin* was the Court's conclusion that the various subsections of Section 2113 were not intended to and should not be allowed to turn the offense of bank robbery into multiple offenses, so that the punishment of a bank robber could be pyramided. It was in furtherance of this perceived legislative intent that *Heflin* held that one convicted as a robber cannot commit the crime of possession of the proceeds. Since it is the fact of conviction of robbery that supplies the predicate for insulating the defendant from punishment for possession of the proceeds, it would be more accurate, if any instruction of this or similar type is to be given to the jury, to inform the jury that its first inquiry ought to be "Is the accused a robber?" If the answer to that question is "yes" beyond a reasonable doubt, then and only then should the jury pretermit its consideration of the possession offense.

b. However, we believe that an either/or instruction, even as so modified, should be avoided. The either/or instruction, by its nature, requests the jury to return either a verdict of acquittal or no verdict (which may be a constructive acquittal)[11] on the counts on which it does not convict, even though on the evidence adduced at trial the defendant has engaged in all of the acts necessary to constitute both the crime of robbery and the crime of possession. If the conviction returned by the jury later is set aside on

[11] Cf. *Green* v. *United States*, 355 U.S. 184.

direct appeal or collateral attack on grounds that would not infect a conviction on the other count, it could be difficult if not impossible to hold a second trial on that count.

As a concrete example, suppose that an individual is charged with robbery and possession of the proceeds. Evidence introduced at trial demonstrates that he was caught red-handed with the loot several hours after the robbery, but that, because he was masked, no one present in the bank can identify him. Circumstantial evidence points to him as the robber, and the jury, given an either/or instruction, convicts him of robbery and (perforce) acquits him of possession of the proceeds. If the robbery conviction were reversed on the ground of insufficiency of the evidence, or, perhaps, on the ground that the circumstantial evidence identifying the accused as the robber was the fruit of an illegal search, the robbery conviction would fail. There would remain not the least doubt that the defendant had unlawfully possessed the proceeds, yet, because he had been "acquitted" of that charge, he could not be retried. The either/or instruction would thus allow a guilty individual to escape. While such occurrences may not be frequent, surely the correct rule would avoid any risk of such a miscarriage of justice if at all possible.

We submit, therefore, that the instructions to the jury should be formulated in such a way that (a) there is but a minimal chance that they will produce windfall acquittals for guilty individuals, and (b) they facilitate the application of the *Heflin* rule of priority (under which the robbery conviction should always be

given priority). As we show below, such rules can be formulated.

2. *The jury should be informed of the elements of each offense and allowed to return a verdict on the facts presented*

We acknowledge, of course, that our objection to the *Milanovich* either/or instruction would not be persuasive if the absence of such an instruction were prejudicial to defendants. But we do not understand how this can be so. The concern articulated by *Heflin* was that Congress had not intended to subject those who robbed a bank to pyramided punishment. Allowing the jury to return verdicts on both offenses does not create cumulative punishment, for the district court can impose but a single sentence, in accordance with the *Heflin* priority rule. Even if the Court also is concerned about the possibility of double convictions that do not lead to cumulative punishments, the mere submission of both counts to the jury does not lead to double convictions. The jury's verdict of guilt on both counts is not a conviction; only the court can enter judgment on that verdict, and the trial court can simply enter judgment on a single offense.[12]

There remains the concern that submission of both counts to the jury, with instructions allowing it to re-

[12] Courts of appeals that have discussed the problems of cumulative judgments (as opposed to cumulative punishments) have adopted this approach to Section 2113 cases. See, *e.g.*, *United States* v. *Faleafine*, 492 F. 2d 18 (C.A. 9) (*en banc*); *O'Clair* v. *United States*, 470 F. 2d 1199 (C.A. 1), certiorari denied, 412 U.S. 921; cf. *Gorman* v. *United States*, 456 F. 2d 1258 (C.A. 2); *United States* v. *Fleming*, 504 F. 2d 1045, 1052–1055 (C.A. 7); but cf. *United States* v. *Corson*, 449 F. 2d 544 (C.A. 3) (*en banc*).

turn verdicts on both, could somehow influence its deliberations in an impermissible fashion. We submit that this concern is nothing more than fanciful speculation. The indictment and evidence going to the jury will be the same whether or not an either/or instruction is given; moreover, with or without such an instruction the jury must necessarily be allowed to consider the circumstances of both the crime of robbery and the crime of possession. Any influence that one count could have upon the jury's consideration of the other will not be modified by the either/or instruction; on the contrary, the instruction simply serves to introduce an element of confusion into the jury's deliberations.

In our view, the either/or instruction denigrates the role of the jury as the body charged with fact-finding in a criminal trial. There is nothing inconsistent between the facts required to find an individual guilty of robbery and the facts required to find that he received, possessed or sequestered the goods subsequently. The jury logically can find that he did both. As we pointed out above, the bar to conviction is purely legal.[13] The jury traditionally has been given discretion to choose among offenses only when presented with greater and lesser included offenses, and even there its task requires it to find whether an element peculiar to the greater crime has been proved beyond a reasonable doubt. The jury's verdict, then, is required to turn on its resolution of the facts. By contrast, however, the either/or instruction invites a jury to pick and choose between offenses *both* of which are proved by the facts. That is a task that traditionally has been left to judges. See *Sansone* v. *United States*, 380 U.S. 343, 349–350 and n. 6; *Berra* v. *United States*, 351 U.S. 131, 134; *Andres* v. *United States*, 333 U.S. 740.

[13] As *Heflin* recognized (358 U.S. at 419): "It may be true that in logic those who divide up the loot following a robbery receive from robbers and thus multiply the offense."

This point has, we think, been made particularly well in *State* v. *Botta*, 27 Ohio St. 2d 196, 271 N.E. 2d 776, a recent decision of the Supreme Court of Ohio. *Botta* expressly rejected the *Milanovich* either/or instruction; the opinion explained (27 Ohio St. 2d at 198–199):

> [W]e believe that there is a clear-cut distinction between the right of the *jury* to pass on the *factual* issue of guilt and the right of the *court* to impose *sentence*. * * * The same considerations which would preclude imposition of separate sentences do not necessarily preclude separate factual determinations of guilt.
>
> * * * * *
>
> Were it not for the existence of the separate crime of larceny, there could be no question as to the right of the jury to conclude guilt as to receiving or concealing stolen property under such circumstances. With or without the existence of the separate crime of larceny, the fact-finding process of a jury * * * would be exactly the same.

Because the "fact-finding process of a jury * * * would be exactly the same" with or without an either/or instruction, the instruction need not be given. The concerns articulated by the *Heflin* Court—

double conviction and cumulative punishment—rest well within the power of the district court to prevent. We conclude, therefore, that no needful purpose is served by an either/or instruction and that its disadvantages, which we have discussed above, call for its abolition.[14]

B. A NEW TRIAL IS NOT NECESSARY TO RECTIFY THE OMISSION OF A REQUIRED EITHER/OR INSTRUCTION

If the Court accepts our argument that no either/or instruction was required, then the district court's charge to the jury was not erroneous, and the jury was entitled to return the verdicts as it did. The court imposed a single sentence on all counts. Respondents

[14] We have canvassed the state decisions that have addressed this problem since *Milanovich*. There appears to be a division among the States concerning the propriety of the either/or instruction. We caution, however, that most of those States requiring an either/or instruction do *not* require a new trial if the court neglects to give that instruction; we discuss the new trial problem at pp. 37–48, *infra*.

States requiring an either/or instruction: People v. *Perez*, 40 Cal. App. 3d 795, 115 Cal. Rptr. 405; *People* v. *Lamirato*, 180 Colo. 250, 504 P. 2d 661; *Commonwealth* v. *Obshatkin*, 307 N.E. 2d 341 (Mass. App.); *State* v. *Tritz*, 522 P. 2d 603 (Mont. Sup. Ct.); *Shepp* v. *State*, 484 P. 2d 563 (Nev. Sup. Ct.); *State* v. *Fioravanti*, 46 N.J. 109, 215 A. 2d 16; *People* v. *Colon*, 28 N.Y. 2d 1, 318 N.Y.S. 2d 929, 267 N.E. 2d 577, certiorari denied, 402 U.S. 905 (adhering to *People* v. *Daghita*, 301 N.Y. 223, 93 N.E. 2d 649 (Fuld. J.)); *State* v. *Koton*, 202 S.E. 2d 823 (W. Va. Sup. Ct.).

States not requiring an either/or instruction: Cannon v. *State*, 289 So. 2d 445 (Fla. App.); *Wells* v. *State*, 127 Ga. App. 109, 192 S.E. 2d 567; *State* v. *Houston*, 211 N.W. 2d 598 (Iowa Sup. Ct.); *Mercer* v. *Commonwealth*, 330 S.W. 2d 734 (Ky. Sup. Ct.) (adhered to in *Lindsey* v. *Commonwealth*, 383 S.W. 2d 333 (Ky. App.)); *State* v. *Botta*, *supra*; *Gossett* v. *State*, 224 Tenn. 374, 455 S.W. 2d 585; *State* v. *Flint*, 4 Wash. App. 545, 483 P. 2d 170.

therefore were neither convicted nor punished separately for the two offenses, and there is no reason to disturb the district court's judgment. It should be affirmed and, if the Court believes it necessary, the case should be returned to that court for resentencing.[15]

On the other hand, if this Court adheres to the requirement of an either/or instruction, it must decide what remedy is necessary to redress the district court's error in neglecting so to charge the jury. We submit that, under the circumstances of this and similar cases, new trials are costly luxuries unnecessary to cure this insubstantial error.

1. *New trials should not be ordered unless they are necessary to cure errors that resist alternative solutions.*

Trials of criminal cases are extremely complex undertakings. Every question asked of a witness implicates principles of evidence that took Wigmore ten volumes to explain. The charge to the jury must draw upon legal rules laid down in literally thousands of this Court's cases. Extemporaneous arguments of counsel may negligently offend principles that would have been respected had there been greater time to research and prepare.[16] At any stage during a trial—particularly a jury trial—errors may be made. The likelihood of transgression grows exponentially as our developing legal system produces more and more rules that, when followed, improve the quality of justice.

In the quest (regrettably, quixotic) for perfect justice, it may be tempting to follow the path of

[15] But see note 8, *supra*.

[16] See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646–647.

rectifying every error by ordering a new trial. But although the new trial will be rid of the error in question, it perforce will offer new occasions for new error. The error cured today may be replaced with other errors as yet unknown.

Even if we could be assured that the second trial would be superior to the first, such trials are a costly balm. They consume scarce judicial resources and, by taking time from other trials, introduce additional delays into the administration of criminal justice. If the judge compensates by increasing his trial load, he may be forced to sacrifice legal study, and so increase the chance of mistake in all of the cases he tries. New trials are also costly in prosecutorial time; the trials of other individuals may have to be postponed or foregone altogether. Finally, they are costly in terms of the achievement of the ends of public justice itself. It is a truism that justice delayed can become justice denied, both for the individual who is to be retried and for other individuals whose trials must be postponed to accommodate someone else's second trial. Evidence may be lost, the memories of witnesses may fade, and witnesses may die or decline to testify. These changes in the conditions of the trial may make a second trial—even if free of "error"—less "fair" than the first. And the degradation in the quality of justice may impair the accused's opportunity to have a fair trial no less than the government's ability to prosecute those guilty of crime.[17]

[17] This case illustrates the problems that can be presented by second trials. We have been informed by the United States Attorney that Davis, the government's principal witness at the first trial and the only witness who was able personally to identify respondents as the robbers, has a new attorney, through whom he has demanded release from prison in return for his cooperation as a witness at a second trial. Of course, because more than 120 days have passed since Davis's conviction became final, neither the prosecution nor a court could provide him with the relief he seeks, nor would it serve the interests of justice to do so even if his release could be arranged. Although Davis presumably could be compelled to testify—his Fifth Amendment privilege has been extinguished by his conviction for this crime—such involuntary testimony might well be inadequate. Another alternative would be to introduce the transcript of Davis's testimony at the first trial (see Fed. R. Evid. 804(b)(1)); this, too, is less than a satisfactory substitute and would produce a trial inferior in quality to respondents' previous trial.

Because new trials are costly in so many ways, Fed. R. Crim. P. 52(a) provides that errors should be noticed only if they affect the substantial rights of a defendant. This Court has repeatedly applied that principle to hold that, although an accused is entitled to a fair trial, he is not entitled to a perfect one. *Lutwak* v. *United States,* 344 U.S. 604, 619; *Hamling* v. *United States,* 418 U.S. 87, 134–135. Cf. *Harrington* v. *California,* 395 U.S. 250. Even if there has been an error affecting substantial rights, the error should lead to a new trial only if it is impossible to employ other means to rectify the error. We submit that this is an occasion where rectification without a new trial is both possible and desirable.

2. Failure to give an either/or instruction can be rectified by vacating the surplus conviction

The error, if any, in failing to give an either/or instruction affects neither the conduct of the trial nor the jury's resolution of any disputed issue of fact. As

Heflin points out, the focal objection is to multiple convictions or cumulative punishments of an offender who has committed what is, in the contemplation of Section 2113, but a single crime. The problem of multiple convictions and cumulative punishments can be completely cured by vacation of the surplus conviction and, if necessary, a remand for resentencing in the event the district court may have enhanced its sentence because of a mistaken belief that separate crimes had been committed. This is the course followed by the vast majority of the States that have considered this question since this Court's decision in *Milanovich*; the remedy of remand for a second trial on both counts has been rejected by those States.[18] See also *Green* v.

[18] We have listed in note 14, *supra*, the States that do not require an either/or instruction. In those States, of course, failure to give such an instruction is not error and no new trial is necessary.

Of the States that, since *Milanovich*, have considered the question and require an either/or instruction, only two (Nevada and West Virginia) require a remand for a new trial, and in both of those cases the facts indicated that the accused was guilty only as an accomplice to the robbery. See *Shepp* v. *State*, 484 P. 2d 563 (Nev. Sup. Ct.); *State* v. *Koton*, 202 S.E.2d 823 (W. Va. Sup. Ct.). All of the other authorities set out in note 14, *supra*, hold that if an individual is convicted of both robbery and possession of the proceeds, the error can be cured by vacating the conviction for possession. See, *e.g.*, *State* v. *Fioravanti*, 46 N.J. 109, 215 A.2d 16, 25 (Weintraub, C. J.), in which the *court* lists *Milanovich* as *contra* and states: "[O]ur cases have consistently held that if a general verdict of guilty is returned upon counts for both larceny and receiving, sentence may be imposed, indeed upon the higher offense if they differ as to severity of authorized punishment, so long as the evidence justifies the verdict of guilty as to that cout."

And see *People* v. *Daghita*, 301 N.Y. 223, 93 N.E. 2d 649 (adhered to in *People* v. *Colon*, *supra*) in which the court, speaking through Judge Fuld, held that when the evidence of defendant's guilt of larceny "is well-nigh overwhelming, no purpose would be served by requring a new trial."

United States, 365 U.S. 301, in which an accused had been given separate but concurrent sentences for violations of Section 2113(a) and (d). The plurality held that this was improper and that the remedy was to vacate the lesser sentence.

3. The reasons adduced in Milanovich to support a second trial do not withstand scrutiny

If, as we contend, the concerns underlying *Heflin* can be so painlessly and completely redressed without a new trial, there is no need to hold one. *Milanovich* suggests three reasons for affording the defendants a new trial, but, as we attempt to demonstrate below, none of those reasons is adequate to justify the result reached.

Milanovich suggests that it is improper for a court to speculate about which crime a properly instructed jury would have selected for conviction. The court would be compelled to "speculate" into the course a jury would have chosen only if the jury has unguided discretion to select which course to follow, and we have argued above (see pp. 20–22) that *Milanovich* implicitly held that the jury has such discretion. But this refusal to recognize or establish a rule of priority is inconsistent with the legislative history of the bank robbery act. The root cause for holding that an individual cannot be punished for both robbery and possession of the proceeds is this Court's conclusion, articulated in *Heflin*, that Congress had not authorized cumulative punishments for robbers. But if this was the congres-

sional design, then a rule of priority, applicable to facts similar to those in *Milanovich* as well as to facts like those here, follows inexorably. Under Section 2113 one *who has been convicted* of robbery is not subject to conviction for possession. No discretion is entrusted to the jury. The jury must examine the robbery charge first and, if it concludes that the accused is a robber, convict on that charge. Only then does the accused acquire insulation against a separate conviction for possession. A district court or an appellate court can proceed in the same fashion; if the jury *has* convicted of robbery, that conviction should be affirmed. This does not require an appellate court to usurp the role of the jury; it need only apply legal rules to factual conclusions already reached *by the jury itself*. Nor must the appellate court "speculate" into what the jury would have done; the jury in the instant case convicted of robbery, and a jury properly instructed about the priority rule would have done the same thing. No "speculation" is necessary; the jury has completed its entire fact-finding and guilt-determining function.

This is the course that courts follow when a jury is improperly allowed to convict of both a greater and a lesser included offense, even though it should have been told that, if it convicts of the greater, it should pretermit the lesser. The district court, or an appellate court, routinely vacates the conviction on the lesser offense and does not require a second trial. See, *e.g., Fuller* v. *United States*, 407 F. 2d 1199, 1227, 1230 (C.A.D.C.) (*en banc*), certiorari denied, 393 U.S. 1120. We are aware of no holding that this procedure

usurps the role of the jury or amounts to improper speculation. Even when the jury has "acquitted" of the lesser offense incident to conviction of the greater, an appellate court, upon finding the evidence insufficient to support the greater but sufficient to support the lesser, may in the interests of judicial economy remand for entry of a judgment of conviction on the lesser count, where such a result accords with the purport of the jury's verdict. *Allison* v. *United States,* 409 F. 2d 445, 451–452 (C.A.D.C.). The court's action in entering a single judgment on the robbery conviction is much less intrusive into the functioning of the jury.[19]

A second reason for retrial suggested by *Milanovich* is that verdicts of guilt on both robbery and possession counts are inconsistent. This is so only by operation of law; they are not factually inconsistent, in the sense that it would be physically impossible for one who robbed the bank to possess the proceeds as well. Indeed, it is physically difficult to do otherwise (once the concept of constructive possession is considered). But even if the verdicts are "inconsistent" in some

[19] In a similar vein, this Court has recognized that if a defendant is given a concurrent sentence on several counts, and the conviction on one count is found to be good, an appellate court may as a discretionary matter not consider the validity of the conviction on the other counts. *Barnes* v. *United States*, 412 U.S. 837; see also *Benton* v. *Maryland*, 395 U.S. 784. One of the rationales underlying this doctrine is that the bad count (or counts)—even if it should not have been submitted to the jury—does not ordinarily influence the jury with respect to the valid count (or counts). It is surely difficult to square the concurrent sentence doctrine with the new trial requirement of *Milanovich*.

a case reasonably, conscientiously, and intelligently. *Duncan* v. *Louisiana,* 391 U.S. 145, 157. Cf. *McGautha* v. *California,* 402 U.S. 183. The available evidence strongly supports this faith in the intelligence and rationality of the jury. See Kalven & Zeisel, *The American Jury* (1966). Verdicts are not set aside on mere speculation regarding the possibility of improper action (*Murphy, supra*).

We assume, therefore, that the Court did not mean to imply that a new trial was required simply because the jury that convicted Mrs. Milanovich might have behaved irrationally if it had been properly instructed. But if the Court meant instead that there is some possibility that a *second* jury would be disposed to lenity—to "nullification" in spite of the evidence—we submit that this is not a proper ground upon which to remand for a new trial. It is an argument that would require retrial after all trials, for it is always possible that some other jury would refuse to convict in spite of evidence sufficient to convince most juries. The argument that a second jury might be disposed to dispense mercy withheld by the first is not an argument for new trials; the accused should be entitled to but one opportunity to benefit from dispensations of this sort.

We are aware of only one class of cases in which the possibility that a properly instructed jury would have exercised a lenity-dispensing power is sufficient to require a second trial. A defendant is entitled to a lesser included offense instruction if "the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater"

sense, this is not a ground for a new trial. *Hamling* v. *United States, supra,* 418 U.S. at 101; *United States* v. *Dotterweich,* 320 U.S. 277, 279; *Dunn* v. *United States,* 284 U.S. 390, 393. Inconsistency would be objectionable, if at all, only in the rare case in which the nature of the verdict returned demonstrated that the jury could not have been attentive to the trial evidence or to the court's instructions. This is hardly so here, for under the court's instructions the jury was permitted to (and did) return verdicts on all counts. Indeed, respondents would have better reason, in light of the district court's instructions, to claim "inconsistency" if the jury had returned a verdict of guilty of robbery and not guilty of possession, or the reverse.

Finally, *Milanovich* intimated that a second trial is required because a properly instructed jury might "conceivably" have acquitted of both counts. We find this intimation hard to evaluate. It appears to imply that a jury, correctly instructed on the elements of each offense and convinced beyond a reasonable doubt that a defendant has engaged in the elements of both, would, if instructed that it could convict of but one, decide instead to convict of neither. This imputes to a jury a degree of irrationality unknown to our law. Indeed, it runs counter to the institution of the jury itself, which presupposes that, on important questions affecting the liberty of a defendant—at least when screened from prejudicial pressures (*Murphy* v. *Florida,* No. 74–5116, decided June 16, 1975) and from legally inadmissible but "powerfully incriminating extrajudicial statements" (*Bruton* v. *United States,* 391 U.S. 123, 135)—the jury can be trusted to decide

(*Keeble* v. *United States,* 412 U.S. 205, 208). A defendant who is convicted of the greater offense after the trial court erroneously denied a lesser included offense instruction has the right to a retrial (or perhaps to a remand for entry of judgment on the lesser count) even though the evidence supports his original conviction. See *Sansone* v. *United States, supra; Berra* v. *United States, supra; Sparf* v. *United States,* 156 U.S. 51. See also *Young* v. *United States,* 309 F. 2d 662 (C.A.D.C.).

A close examination of this doctrine, however, demonstrates that it does not support *Milanovich.* The defendant in the lesser included offense cases is entitled to a retrial only when there was a rational basis, demonstrable on the record of the first trial, for a verdict of acquittal of the offense charged and a conviction of the included offense; that limitation is basic to the area of lesser included offenses, "where the doctrines have been shaped from the start so as to exclude claims based on the hope of irrational * * * verdicts" (*Fuller* v. *United States, supra,* 407 F.2d at 1232). The premise supporting a second trial where a lesser included offense instruction was improperly denied at the first trial is that a jury, put to a choice between acquittal and conviction of the greater offense, might disregard what would otherwise be a reasonable doubt about the existence of the disputed fact distinguishing the greater from the lesser offense. But that rationale did not apply in *Milanovich* itself: the evidence on the two counts was distinct, and both counts went to the jury; the Court held that the jury had been afforded too many, not too few, fact-finding options. Nor does the lesser included offense rationale apply to the instant case; here, there was no rational basis, demonstrable on the record, for a verdict acquitting respondents of robbery and convicting them of possessing the proceeds. Quite the contrary. On the facts presented, acquittal on the former would rationally have compelled acquittal on the latter.

Speculation that the jury might have been inclined to dispense mercy by drawing a distinction unsupported by the evidence does not create a right to a lesser-included-offense instruction. As the District of Columbia Circuit stated in *Kelly* v. *United States,* 370 F.2d 227, 229, certiorari denied, 388 U.S. 913, "An element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction." See also *United States* v. *Markis,* 352 F.2d 860, 867 (C.A. 2).

Finally, unlike the erroneous refusal to grant a lesser-included-offense instruction, the absence of an either/or instruction in this case did not eliminate one of the jury's available fact-finding options but actually added to them. See *Keeble* v. *United States, supra,* 412 U.S. at 212–213.

It appears, therefore, that there is no persuasive reason to provide respondents a new trial. A rule that would entitle respondents to a new trial is contrary to the well-settled principle that retrials are not justified when there is no showing of prejudice other than the argument, cast in terms of jury room mystique, that "somehow the whole thing might have gone differently

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had only the words been changed a bit" (*Fuller* v. *United States, supra,* 407 F. 2d at 1232). Respondents, fairly convicted of robbery, should not be given the windfall of a new trial merely because of the barely credible possibility that the original jury, if "forced" to choose, irrationally might have elected to convict them of possession or acquitted altogether. If *Milanovich* compels a new trial in these circumstances, then *Milanovich* should be overruled.

III

IF RESPONDENTS MUST BE TRIED AGAIN, THE NEW TRIAL SHOULD BE LIMITED TO THE QUESTION OF WHICH CRIME THEY COMMITTED

If the Court disagrees with all of the arguments we have presented above and concludes that respondents are entitled to a second trial on all counts, we respectfully request it to delineate the questions that will be open to consideration during that trial. The court of appeals did not address this question, but simply remanded for a new trial; we presume from the generality of its judgment (Pet. App. B) that it would allow respondents to argue (as they argued at their first trial) that they are innocent of all offenses. It is not clear to us why respondents should be allowed to present that argument to the jury. The only reason for the remand and second trial would be that the jury must be allowed to choose between offenses. There is no need to put to a jury the additional question whether respondents have committed *any* offense; that question was settled by the first jury, and there is no reason to believe that any error infected the first jury's

conclusion that respondents were guilty of an offense.

It is superficially plausible that our arguments in this regard should be presented to the district court on remand rather than to this Court. We think it may be appropriate, however, for this Court to pass upon the matter at this stage of the litigation, because the district court will be bound by the terms of this Court's mandate, whatever those terms may be. Moreover, our position is arguably inconsistent with the suggestion in *Milanovich* (365 U.S. at 555) that a properly instructed jury might have acquitted altogether, and, if the Court does not clarify the issues open on a second trial, we doubt that a district court or court of appeals would feel free to disregard the implications of that language.[20]

Furthermore, unless the issue is resolved here, it will be impossible for the government to obtain review of an adverse decision in the district court. If that court decides to resubmit the general question of guilt or innocence to the jury, and the government prevails before that jury, it will have no grievance requiring appellate review. On the other hand, if the jury, so instructed, acquits altogether, the Double Jeopardy Clause may preclude appeal since another retrial with proper instructions would be barred. And in either

[20] For purposes of this argument we must discount, of course, the possibility that the first jury, if given an either/or instruction, would have acquitted. As we argued above, however (pages 44–48, *supra*), that argument presumed that juries act irrationally, and a hypothetical possibility of irrational conduct by some other juries is not an adequate basis on which to impeach this jury's actual behavior.

event there will have been burdensome and unnecessary relitigation of issues already fairly decided by the first jury. We therefore believe that it is appropriate, if this Court decides that respondents must be retried, for the Court to indicate what issues would be open on the retrial.

The procedure we have suggested—retrial limited to the question of culpability for one offense or the other—is an uncommon procedure in criminal cases, and we know of no precedent for it in this Court. But *Milanovich* is an uncommon case, and limited retrial is used in analogous situations. Fed. R. Civ. P. 59 expressly provides for limited retrials in civil cases, and this Court has approved the practice. In *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, the court of appeals had set aside a verdict entered after a civil jury trial and remanded for a second trial limited to the issue of the quantum of damages. Petitioner argued to this Court that the second trial, so limited, would deprive it of its constitutional right to trial by jury. This Court unanimously disagreed (283 U.S. at 497, 498, 499):

> It is true that at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all. [Footnote omitted.]
>
> * * * * *
>
> * * * But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination

> with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law.
>
> * * * * *
>
> * * * Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again.

The procedure of remanding for a new trial on limited issues is rare in criminal cases only because the circumstances that would call it forth are rare. As the Court emphasized in *Gasoline Products* (283 U.S. at 500), the issues to be taken as settled at the second trial must have been adequately determined in the first trial and must be sufficiently separable from the issue to be retried that "a trial of it alone may be had without injustice." [21]

Ordinarily, in a criminal case, any error requiring an appellate court to set aside a judgment would fall into one of two categories: (a) the error affected the evidence heard or the way in which the jury was to deal with the evidence, so that the error infected the entire fact-finding process; or (b) the error could be corrected without a second trial. We have, of course, contended above that the error, if any, in not giving the jury an either/or instruction falls into the latter category. But if the Court disagrees with that assessment,

[21] The *Gasoline Products* rule has been extensively elaborated upon in civil cases. Retrials routinely are limited to single issues when other issues have been reliably determined by the first jury. See the cases collected in 6A Moore's *Federal Practice* ¶ 59.06 (1974).

we contend that, quite plainly, the error does not fall into the former grouping. The lack of an either/or instruction does not affect the evidence introduced at trial, the arguments of counsel, or the way in which the jury will evaluate the facts. There is no reason to think that the lack of an either/or instruction caused the jury at respondents' trial falsely to conclude that respondents did, in fact, rob the bank and carry away the proceeds. The only problem was that the jury was not adequately informed what it should do with its conclusion that respondents *both* robbed the bank and possessed their booty. It would, therefore, be an adequate remedy to tell the second jury that, at a prior trial, a jury has determined that respondents both robbed the bank and carried away their loot; the second jury then would be told to evaluate, in light of such evidence as the government and defense introduced, for which of the two crimes respondents should be convicted.[22]

We are aware of no salient difference between civil and criminal cases that would make the device of partial retrial inappropriate in criminal cases.

[22] We can imagine only a few classes of criminal cases in which retrials might be similarly limited. When a jury erroneously is not given a lesser included offense instruction and convicts of the greater offense as charged, it should be proper to limit a second trial to the choice between the greater and lesser offenses. As another example, when a jury is given improper instructions regarding an insanity defense and convicts of the crime as charged, it would be proper to limit a retrial to the issue of insanity. Such "release hearings" are routinely held in federal cases when insanity is belatedly injected into a case. *Whalen* v. *United States*, 346 F.2d 812 (C.A.D.C.), certiorari denied, 382 U.S. 862; *United States* v. *Wright*, 511 F.2d 1311 (C.A.D.C.).

As one court has written, the basic rationale for limiting the issues upon retrial is that when a "[d]efendant * * * has had a fair trial on the issue of liability[,] * * * it would be * * * grossly unfair to plaintiff * * * to require a retrial of the question of defendant's culpability which has already been decided by the jury in plaintiff's favor." *Yates* v. *Dann*, 11 F.R.D. 386, 394 (D. Del.). That interest is the same whether the controversy is civil or criminal. So, too, the defendant's interest in trial by jury is the same; although criminal defendants are entitled to jury trial of issues that need not be submitted to civil juries, and although the prosecution bears a higher burden of proof in a criminal case, neither of these differences is implicated in a partial retrial. Here the issues already have been presented to a jury, which concluded that the prosecution had shown, beyond a reasonable doubt, that respondents both robbed the bank and possessed the proceeds of that robbery.

Nor do we think it important that there is no rule of criminal procedure comparable to Fed. R. Civ. P. 59. The statute governing remedies by this Court (28 U.S.C. 2106) provides that the Court can remand to "require such further proceedings to be had as may be just under the circumstances."[23] This provision has been expansively construed (*Bryan* v. *United*

[23] 28 U.S.C. 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

States, 338 U.S. 552) and is more than adequate to support an order of retrial limited to specified issues should the Court believe such an order "just under the circumstances."

We submit, therefore, that respondents' retrial, if one is necessary, should be limited to a trial the sole function of which is to give the jury a choice between conviction of respondents for robbery or conviction of respondents for possession of the proceeds. It was, after all, the failure of the first jury to exercise such a choice that is the predicate for requiring further proceedings; we see no reason why the further proceedings should be more extensive than the rationale for requiring them to be held. This is especially so since witnesses may die or disappear, evidence may be lost or destroyed, and recollections may dim between the first and second trials; an acquittal on both counts at a second trial that is the product of factors such as these could hardly be said to comport with the ends of public justice.

Although there is no exact precedent for this procedure in federal criminal cases, there is a wealth of analogies, all of which suggest that the procedure is both desirable and proper. Many States (and some federal courts) hold bifurcated trials, at which one jury determines liability for the crime and a second jury assesses the punishment (see *McGautha, supra*). The second jury is not at liberty to set at naught the first jury's determination of liability. Although multiple jury proceedings are uncommon in the federal system, one has been created by the Antihijacking Act of 1974, Pub. L. 93–366, 88 Stat. 409, 411, adding 49

U.S.C. 1473(c)(2)(B)(iii); and, even though the federal system does not use multiple juries as a matter of course, there should not be an impediment to the creation of a separate "penalty" jury where, as here, the first jury has been dismissed without making the election required by the either/or instruction set out in *Milanovich.* There is no need to resubmit to the jury at a new trial the general issue of guilt or innocence, which already has been decided adversely to respondents after a trial fair in all particulars.

Similarly, the doctrine of "law of the case" provides that an issue fairly decided between two parties in an ongoing proceeding remains decided throughout the course of those proceedings. As applied to this case, the determination by the jury that respondents committed all of the acts necessary to establish their guilt should become "law of the case," not subject to reexamination in subsequent proceedings. "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States* v. *United States Smelting Refining & Mining Co.,* 339 U.S. 186, 198. The same principle applies here: the question of respondents' participation in the robbery has been litigated and decided; it need not be submitted to another jury.[24]

Finally, the analogy to collateral estoppel is suggestive. Collateral estoppel precludes two parties from

[24] We are not aware of any case intimating that the doctrine of law of the case is inapplicable to criminal cases. The contrary seems widely accepted. See *United States* v. *Van Sirrs,* 434 F. 2d 1026 (C.A. 9).

relitigating questions already decided between themselves in an earlier proceeding. This Court has held that its use by a defendant against the prosecution is part of the defendant's protection against double jeopardy (*Ashe* v. *Swenson,* 397 U.S. 436). Collateral estoppel also precludes defendants from relitigating issues previously decided adversely to them in criminal proceedings. See, *e.g., Hernandez-Uribe* v. *United States,* 515 F. 2d 20 (C.A. 8); *United States* v. *Colacurcio,* 514 F. 2d 1 (C.A. 9); *Pena-Cabanillas* v. *United States,* 394 F. 2d 785 (C.A. 9); *United States* v. *Rangel-Perez,* 179 F. Supp. 619 (S.D. Cal.) If the accused has had, in the first proceeding, adequate opportunity and incentive to litigate an issue, there is nothing unfair in binding him, in later proceedings, to the first tribunal's resolution.[25]

When in the past this Court has had occasion to consider the effect of collateral estoppel, it has often pointed out that the estoppel effect is the same in criminal cases as it is in civil cases. The estoppel "'principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.' *Frank* v. *Mangum,* 237 U.S. 309, 334 (1915); *Sealfon* v. *United States,* 332 U.S. 575, 578 (1948)." *Emich Motors Corp.* v. *General Motors Corp.,* 340 U.S. 558, 568. See also *United States* v. *Oppenheimer,* 242 U.S. 85.

[25] See vestal and Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 Vand. L. Rev. 683, 698 (1966): "[I]t would seem completely reasonable to hold that preclusive effect can be given to a conviction" so that an accused is precluded from relitigating the issues decided adversely to him. See also *State* v. *Sargood*, 80 Vt. 412, 68 A. 51.

We conclude that it is not inappropriate to instruct a jury on remand that respondents' participation in the crime has been decided adversely to them in a prior proceeding that is conclusive on the issue. The second jury should be instructed that its task is to exercise the discretion to choose between the offenses.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings consistent with the opinion of this Court.

Respectfully submitted.

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JULY 1975.

APPENDIX

The federal bank robbery act, 18 U.S.C. 2113, provides:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession

of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporations.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in

section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

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IN THE

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OCTOBER TERM, 1975

No. 74-1141

UNITED STATES OF AMERICA,

Petitioner,

v.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS; AND QUESTION PRESENTED

The Government's brief accurately refers to (1) the reported and unreported decisions below, (2) the jurisdictional basis for this Court's review, (3) the relevant constitutional provisions, statutes and regulations involved, and (4) the question presented.

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

On March 6, 1974, according to the testimony of a number of government witnesses, the Bank of Loganville, Georgia, was robbed by two armed robbers who entered the bank about 10:30 A.M. wearing ski masks. (T. 28, 39, 45, 50 and 55). In addition to the two armed robbers that entered the bank, there was a third masked person outside the bank who was driving what was reported to be a getaway car for the robbers. (T. 71, 84). During the course of the robbery, one robber held a number of employees at bay in the lobby of the bank with a pistol and the other robber vaulted the teller cage and emptied the cash drawers, taking an estimated $7,501.73. (T. 105).

When the two robbers entered the bank, they were yelling and giving orders (T. 55) and the robber who vaulted the teller cage ordered the tellers to lay down against the wall while he emptied the cash drawers (T. 40, 43). Ms. Brooks, a teller at the bank, testified that this robber spoke in a deep voice and otherwise characterized the voice of the robber as "gravely." (T. 40, 43).

On departing the bank the robbers encountered Officer Cody of the Loganville police and exchanged gunfire with the officer. (T. 69). An eyewitness to the robbery, Robert Alton Webb, testified that the driver of the car had long brown hair and it might have been a woman. (T. 92). A number of marked bills described as bait money were taken from the bank by the robbers. (T. 107).

Billy Wayne Davis, Billy Sunday Birt and Bobby Gene Gaddis were charged with having committed the

robbery. Billy Wayne Davis pled guilty to the charges and appeared at the trial of Birt and Gaddis as a witness for the government. (T. 157-204).

At the trial of Birt and Gaddis, F.B.I. Agent Kane testified that after receiving a report from Toccoa, Georgia, that Mrs. Mary Davis, the wife of Billy Wayne Davis, had deposited some of the bait money from the robbery in a Toccoa bank (T. 115) he visited the Davis home whereupon he discovered additional bait money in the Davis' freezer. (T. 135). Mrs. Mary Davis testified that she received the money from her husband, Billy Wayne Davis. (T. 145).

In the prosecution of its case, the government presented some twenty-two witnesses and of these witnesses only one, co-defendant Billy Wayne Davis, was able to identify either Birt or Gaddis as being present at the Bank of Loganville the day it was robbed. There was no independent testimony to otherwise connect Birt or Gaddis with the robbery. Furthermore, at the trial, a number of lay witnesses testified that Birt and Gaddis were in Winder, Georgia, on the day and at the time the Bank of Loganville, Georgia, was robbed. (T. 205, 211, 231, 251). And, there was testimony by Mrs. Betty Maddox, Birt's third grade teacher, that Birt's speech impediment that was so evident during the trial was as serious at the time of the trial as it had been when she taught him in the third grade. (T. 229). Birt stuttered or otherwise slurred his speech to the point that at times he could not be understood. According to the government's scenario Birt was the robber who vaulted the teller cage and ordered the women to lie down and shouted other instructions to the employees of the bank. However, not one of the

employees detected anything strange or unusual about the speech of this robber other than it was a deep gravely voice. (T. 40, 43).

ARGUMENT

I.

THE *MILANOVICH* DECISION IS A LOGICAL APPROACH TO THE ERROR COMPLAINED OF IN THIS CASE AND SHOULD NOT BE OVERRULED.

This Honorable Court in *Milanovich v. United States*, 365 U.S. 551 held that an accused cannot be convicted of theft and of receiving or possessing the stolen property. In reaching this conclusion this Court relied primarily on an earlier decision, *Heflin v. United States*, 358 U.S. 415. A consideration of *Heflin* is part and partial of an analysis of *Milanovich*.

The defendant in *Heflin*, like the respondents in this case, was indicted and convicted of bank robbery, 18 U.S.C. § 2113(a) and of receiving the stolen money, 18 U.S.C. § 2113(c). On a motion for correction of sentence under 28 U.S.C. § 2255 this Court held that taking and receiving are two completely separate and independent crimes which can be committed only by separate persons. The defendant had been given consecutive sentences and on review the only question before the Court was whether the sentence was invalid on its face. Given the foregoing reasoning the response was affirmative. The case was not remanded for a new

trial because it was an out of time appeal and the scope of the review was limited.

The decision in *Heflin* was based in part on a consideration of the legislative history of § 2113(c).[1]

The lower appellate courts of this country have followed the *Heflin-Milanovich* doctrine for over fifteen

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[1] "Subsection (c) § 2113, with which we are now primarily concerned, came into the law in 1940. The legislative history is meagre. The Senate Report (S. Rep. No. 1801, 76th Cong. 3d Sess.) is captioned 'Punishment for Receivers of Loot from Bank Robbers.' The Report states, 'This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 fine and 10 years imprisonment, or both) to willfully become a receiver or possessor of property taken in violation of the statute,' p. 1. Similarly the House Report states 'Present law does not make it a separate substantive offense knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act, and this bill is designed to cover the omission.' HR Rep No. 1668, 76th Cong., 3d Sess., p.1.

This clue to the purpose of Congress argues strongly against the position of the Government. From these Reports it seems clear that subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. It may be true that in logic those who divide up the loot following a robbery receive from robbers and thus multiply the offense. But in view of the legislative history of subsection (c) we think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." *Heflin, supra*. 419.

A recent decision by this Court clearly demonstrates the importance of legislative history in interpreting a law and determining its appropriate application. *See Iannelli v. United States*, ____ U.S. ____, 43 L.Ed. 2d 616, 628-630, 95 S. Ct. 1284.

years.[2] Moreover, the principle of law that undergirds the reasoning that the principal in a theft, or the person who actually steals the property, cannot be convicted of the crime of receiving or possessing the property stolen has found support in American and English jurisprudence for over 200 years. *See* 136 A.L.R. 1087 and citations at 1088-1090.

Illustrative of the cases in point is the case of *Regina v. Evans*, 7 Cox. C.C. 151, a Queen's Bench decision in

[2]The following are a number of cases that have considered the *Heflin-Milanovich* doctrine.

THIRD CIRCUIT: United States v. Roach, 321 F.2d 1 (C.A. 3); *United States v. Welty*, 426 F.2d 615 (C.A. 3) (recognizing rule).

FOURTH CIRCUIT: United States v. Harris, 346 F.2d 182 (C.A. 4); *United States v. Lawrenson*, 196 F. Supp. 838 (DC Md) (recognizing rule), affd. 298 F.2d 880, (C.A. 4); cert. den. 370 U.S. 947;

FIFTH CIRCUIT: Baker v. United States, 357 F.2d 11 (C.A. 5) (recognizing rule); *Thomas v. United States*, 418 F.2d 567 (C.A. 5); *Grant v. United States*, 424 F.2d 273 (C.A. 5) (recognizing rule), overruled on other grounds; *United States v. Woodall*, 438 F.2d 1317 (C.A. 5) cert. den. 403 U.S. 933; *United States v. White*, 440 F.2d 978 (C.A. 5) (recognizing rule); *Rose v. United States*, 448 F.2d 389 (C.A. 5);

SIXTH CIRCUIT: Matlock v. United States, 309 F. Supp. 398 (DC Tenn) (recognizing rule).

SEVENTH CIRCUIT: United States v. Parker, 181 F. Supp. 73 (DC Ind) (recognizing rule), affd 283 F.2d 862 (C.A. 7), cert. den. 366 U.S. 937.

EIGHT CIRCUIT: United States v. Jones, 418 F.2d 818 (C.A. 8) (recognizing rule).

NINTH CIRCUIT: Clermont v. United States, 432 F.2d 1215, (C.A. 9), cert. den. 402 U.S. 997, *but see United States v. Tyler*, 466 F.2d 920 (C.A. 9);

TENTH CIRCUIT: Glass v. United States, 351 F.2d 678 (C.A. 10) (recognizing rule); *Jenkins v. United States*, 361 F.2d 615 (C.A. 10).

the era 1783-1796.[3] As noted in the dissenting opinion in *Dunn v. United States*, 284 U.S. 390, 401, the defendant in *Regina v. Evans, supra* was accused of stealing sheep and receiving them the same day in a two count complaint. He was found guilty on both counts.

> This record must therefore be dealt with as if there had been a special verdict, on which the court should find matter which would not justify either an acquittal or conviction. The practice in such a case has been to award a *venire de novo*. The cases in Lord Raymond's reports, and the later cases, sanction such a course, and we cannot see any good grounds for distinguishing an uncertain general verdict, such as this, from an uncertain special verdict. *Dunn v. United States, supra* at 490.

Given the above premise it is the duty of the trial court to insure that an accused is not convicted of both robbery and possession of the same property. The only way to protect an accused from this result were the government chooses to indict for both offenses is for the trial judge to instruct the jury that they can convict the accused of either robbery or receiving but not both. This either/or instruction is especially prudent where on trial, as in the present set of circumstances, it develops that one of the accused participants merely drove the robbers to the scene as in *Milanovich*.

Further, in our view, it is of no import that respondents were also charged with aiding and abetting

[3]The full text of *Regina v. Evans* is reported in either Vol. 29 or Vol. 30 of English Reports, however, the writer was unable to obtain a copy of the full text after a survey of local law libraries. Therefore, the case is offered as analysed by the Court in *Dunn v. United States, supra.*

under 18 U.S.C. § 2. Attempts to distinguish similar cases and thereby take them out of the purview of *Milanovich* have been rejected by the lower appellate courts. *See Baker v. United States*, 357 F.2d 11 (C.A. 5) and *Glass v. United States*, 351 F.2d 678 (C.A. 10).

In *Baker, supra*, the defendant personally transported the actual robbers to the scene and shortly afterwards met the actual robbers at a previously designated place. The reviewing court reversed the defendant's conviction both for aiding and abetting in the commission of the robbery and receiving stolen money on the grounds that the defendant as a principal in the robbery under 18 U.S.C. § 2, could not be convicted of receiving the proceeds of the robbery. Further, he could not be prosecuted for both offenses in the absence of an instruction to the jury that the defendant could be convicted of either but not both. The reviewing court in *Glass, supra* reached the same conclusion under a similar set of circumstances. While these are circuit court opinions the rationale of each is sound and should be applied to this case.[4]

A. The *Milanovich* decision requires a new trial on the facts of this case.

The issue before this Court is not one of fact but of law and concerns the absence of a proper charge by the trial judge given the indictment, charge and verdict in this case which resulted in respondents being convicted

[4]*See* 12 A.L.R. Fed. 664, 685 for an analysis of *Baker, supra* and *Glass, supra* as applied here.

of robbery in violation of 18 U.S.C. 2113(a), and (d) and possession of the money stolen from the bank in violation of 18 U.S.C. 2113(c). Any verbage seeking to distinguish the *Milanovich* decision from the case at bar on the facts is superfluous in the respondents' view. As Judge Duniway noted in his concurring and dissenting opinion in *United States v. Tyler*, 466 F.2d 920, 926 (C.A. 9);

> case does not decide only the exact factual question that it presents; it decides that question on the basis of a reason - a *ratio decidendi* - and it is authority in every other case in which that *ratio decidendi* is applicable.

Assuming arguendo that a comparison of the factual make-up of *Milanovich, supra*, and the present set of circumstances is appropriate, petitioner's attempt to distinguish the cases fails. (Pet. Brief, pp. 18-25).

In *Milanovich, supra*, Mrs. Milanovich drove the participants of the theft of a United States Naval Commissary to the scene of the crime. However, she departed before the thieves returned from the building. She later came into possession of the fruits of the crime on a return trip to the scene. *Milanovich, supra*, at 557. In the set of circumstances now under consideration, at least as to one of the respondents, the participation was much the same. One man drove the getaway car to the scene and waited while the two robbers held up the bank and then drove them away. It is a distinction without a difference that on the one hand Mrs. Milanovich drove away early, and here the driver waited for the robbers. Moreover, the time span between the taking and the possession is of little importance.

It is conceded that this argument can only be made on behalf of the driver of the vehicle who was

identified as Gaddis by the government's chief witness, co-confederate Billy Wayne Davis. However, given the testimony concerning Birt's speech impediment and the extent of the language purportedly used inside the bank by Davis' partner, the jury might have concluded that Birt did not enter the bank but was the driver of the car. Suffice it to say, there is not such a distinction in the factual pattern involved in the *Milanovich* decision and in the case at bar to render the *Milanovich* rule inappropriate.

Certainly, if the government in preparation of its indictment did not harbor the thought that a properly instructed jury might find the driver of the getaway car not guilty of robbery, then it would not have included the possession count in the indictment. And, contrary to petitioner's position, it would have been logically possible for the jury to acquit at least one of the respondents of robbery and to convict him of possession.

Accepting that the precepts enunciated in *Milanovich, supra*, are sound principles of law, then as applied to these respondents a new trial is demanded.

> There is no way of knowing what verdict a properly instructed jury would have returned in this case, and for a reviewing court to speculate on that subject would be to usurp the functions of both the jury and the sentencing judge. *Milanovich v. U.S.*, 1961, 365 U.S. 551, 81 S. Ct. 728, 5 L.Ed. 2d 773. Since the jury's verdict was inherently inconsistent, the proper appellate remedy is to remand for a new trial. *U.S. v. Gaddis*, 506 F.2d 352, 354 (C.A. 5).

B. The new trial should be a complete rehearing and not one limited to which crime respondents committed.

On brief petitioner suggests that if this Court concludes that a new trial is required then the function of the new trial should be to determine whether the respondents are guilty of possession or robbery. In support of this theory petitioner attempts to analogize the present case with this Court's ruling in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494; (Pet. Brief, p. 50).

In *Gasoline Products, supra*, it was determined that a new trial may be granted in a civil case on the issue of damages thus denying a rehearing on liability where reversible error is limited to the question of damages. This bifurcated approach is realistic in a civil setting for the jury must clear the threshold issue of liability before considering the damages question. If the liability issue is resolved in favor of the defendant there is no further deliberation. Criminal cases do not lend themselves to this type of analysis. Juries are not instructed to determine first, whether the defendant is guilty and, if so, then of what.

There is no merit in petitioner's argument that the *Gasoline Products* rationale is applicable in this case as a cure for the error committed by the trial court. A new trial on all the issues is the proper means for correcting the absence of the required either/or instruction below.

C. The Common Law Rule of Priority is not applicable in this case.

This Court should not adopt a rule of priority in this case and merely remand the matter to the trial court for vacation of the possession conviction. This approach would leave the twenty-five year sentence for violation of § 2113(d) intact. It is interesting to note that the government made a similar argument before the United States Court of Appeals for the Fifth Circuit, only there the suggested remedy was vacation of the robbery conviction thereby leaving the ten-year sentence for possession in effect. (Appellee's brief pp. 14-15 *United States v. Gaddis, supra*).

If possession was a lesser included offense of robbery under the statute in question, this remedy might have some validity. However, the error complained of here is not one of conviction of a primary offense and a lesser included offense, but rather the error here is that the respondents have been convicted of two offenses which are mutually exclusive. There is a merger of the § 2113 (a), (b), (d) and (e) on conviction as in the situation where there is a conviction of a primary offense and a lesser included offense. *United States v. Anderson*, 448 F.2d 1379 (C.A. 3). There is no merger of § 2113(c) and therefore the rule of priorities where multiple convictions occur is inappropriate here.

II.

IF MILANOVICH MUST BE OVERRULED, THE DECISION SHOULD BE APPLIED PROSPECTIVELY AND THESE RESPONDENTS SHOULD NOT BE DENIED A NEW TRIAL.

Should this Court decide that the *Milanovich* decision must be overruled, then the decision should be applied prospectively only. Respondents concede that there is a little precedent for such an application. However, as to civil matters, this Court has upheld the power of a state court to do so in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358. In the *Sunburst* case the Montana Supreme Court had ruled, in 1921, that if railroad freight charges paid by a shipper are later found to be excessive by the State Railroad Commission, the shipper could sue to recover the excess. Some years later, *Sunburst*, a shipper, sued a railroad in such a situation. The Montana Supreme Court then announced that its 1921 ruling was erroneous and would not be followed in the future but that the plaintiff-shipper in the case before it would be permitted to recover because it had relied on the 1921 holding.

The rationale of the *Sunburst* ruling is appropriate in this case. Clearly, in the past, cases originating from similar factual backgrounds in the district courts of the Fifth Circuit have resulted in the defendants being granted new trials. *United States v. Abercrombie*, 480 F.2d 961 (C.A. 5) cert. den., 414 U.S. 1008; *United States v. White*, 440 F.2d 978 (C.A. 5). Respondents respectfully urge this Court to allow them a new trial even if the *Milanovich* decision is overruled.

CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded to the district court for a new trial.

Respectfully submitted,

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